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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 115

GENERAL MOTORS CORPORATION,
Appellant,
v.
STATE OF WASHINGTON, ET AL.,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR APPELLANT

ALOYSIUS F. POWER,
DONALD K. BARNES,
THOMAS J. HUGHES,
3044 West Grand Boulevard,
Detroit, Michigan, 48202;
DEWITT WILLIAMS,
1440 Washington Building,
Seattle, Washington, 98101,
Attorneys for Appellant.

WILLIAMS, LANZA, KASTNER & GIBBS,
Seattle, Washington,
Of Counsel.

Interstate Brief & Record Co., 356 Congress St. E., Detroit 26, Michigan

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Superior Court of the State of Washington for Thurston County (R. 21-22) is not officially reported. The *en banc* opinion of the Supreme Court of the State of Washington (R. 439-454) is reported at 60 Wn. 2d 862, 376 P. 2d 843.

JURISDICTION

The final judgment of the Washington Supreme Court, the highest state court in which a decision could be had, was entered on January 7, 1963 (R. 455). On March 6, 1963, notice of appeal to this Court (R. 456-458) was filed in the Washington Supreme Court pursuant to Rule 11(3) of this Court and 63 Stat. 104, 28 U.S.C. §2101(c). On May 3, 1963, the jurisdictional statement was filed and the case docketed in this Court pursuant to Rule 13. Probable jurisdiction was noted on June 17, 1963 (R. 459), 374 U.S. 824. The jurisdiction of this Court rests on 62 Stat. 929, 28 U.S.C. §1257(2).

QUESTIONS PRESENTED[1]

(1) Is a Washington tax on the privilege of engaging in the business of making sales at wholesale within said state, and which is measured by unapportioned gross receipts, repugnant to the Commerce Clause of the United States Constitution when applied to the entire gross receipts from sales of goods manufactured and sold wholly without the state by a foreign corporation to retail dealers located within the state, when that corporation's in-state business activities with respect to such dealers consist only of checking on the performance by such dealers of their Dealer Selling Agreements with said foreign corporation and assisting such dealers, principally by advice, with respect to their conduct of their retail businesses?

Subsidiary to this question are the following:

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[1] Repeated *verbatim* from Jurisdictional Statement.

(a) Is such a tax a prohibited exaction on the privilege of engaging in interstate commerce when there is no local office in any way related to the transactions upon which the tax is based, there is no separable intrastate commerce, and the only in-state aspects are the locations of the customers (retail dealers), national advertising placed outside the state, and regular contacts with the customers at their places of business by traveling representatives, some of whom reside in the state (hereinafter referred to as transactions of the first class)?

(b) Does the Commerce Clause prohibit such an exposure of the interstate commerce to the risk of multiple burdens and as to some of the transactions to actual double taxation?

(c) Are the answers to (a) and (b) the same for other transactions which are in all respects similar except for the addition of an office in the state staffed by one man (and his secretary) whose duties are to give additional advice to dealers in all of Alaska and parts of Washington and Idaho and to assist them primarily by expediting shipments in periods of short supply (hereinafter referred to as transactions of the second class)?

(2) Is a Washington tax measured by unapportioned gross receipts which is laid on both the privilege of manufacturing and the privilege of selling, but exempts from tax as manufacturers those who pay the tax as sellers, repugnant to the Commerce Clause of the United States Constitution when applied to an out-of-state manufacturer, because it assures only a single tax on a combination of local manufacture and sale while exposing combinations of local manufacture and out-of-state sale and out-of-state

manufacture and local sale to multiple burdens and double taxation, thus providing a direct commercial advantage to intrastate business?

(3) Is a Washington tax on the privilege of engaging in the business of making sales at wholesale within said state, and which is measured by unapportioned gross receipts, repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution when applied to the entire gross receipts of a foreign corporation from sale of goods manufactured and sold wholly without the state to retail dealers located within the state when that manufacturer's in-state activities with respect to such dealers consist only of checking on the performance by such dealers of their Dealer Selling Agreements with said foreign corporation and assisting such dealers, principally by advice, with respect to their conduct of their retail businesses?

Subsidiary to this question are the following:

(a) Is such a tax an unwarranted projection of state power beyond its borders and the taking of property without due process of law when it is measured by the unapportioned gross receipts from manufacture and sale conducted wholly without the state, with only those in-state aspects described in Question (1)(a) and, as to some transactions, in Question (1)(c)?

(b) Is such a tax so measured grossly disproportionate to the protection and benefits conferred by the state upon the business when the only in-state aspects to be protected and benefited are those described in Question (1)(a) and, as to some transactions, in Question (1)(c)?

STATUTES AND CONSTITUTIONAL PROVISIONS

The tax here involved is imposed by Title 82, Chapter 82.04, of the Revised Code of Washington (RCW). Pertinent portions of RCW sections 82.04.040, 82.04.060, 82.04.070, 82.04.220, 82.04.240, 82.04.270, 82.04.295, 82.04.440, and 82.04.500 with volume and page citations to the official edition are set forth in Appendix A hereto (*infra*, pp. 1a-4a).

Sections 31, 32 and 51 of Chapter 13 of the Revised Code of the City of St. Louis, 1948 are set forth in Appendix B hereto (*infra*, pp. 5a-6a).

Public Law 86-272, 73 Stat. 555 (15 U.S.C. §381-384) is set forth in Appendix C hereto (*infra*, pp. 7a-9a).

Art. I, §8, cl. 3 of the Constitution of the United States (Commerce Clause) and the Due Process Clause of the Fourteenth Amendment to that Constitution are set forth in Appendix D hereto (*infra*, p. 10a).

STATEMENT OF THE CASE

This is an appeal by General Motors Corporation from a final judgment of the Washington Supreme Court (R. 455) sustaining assessments of Washington business and occupation tax, purportedly imposed for the privilege of "engaging within this state in the business of making sales at wholesale," RCW 82.04.270. The tax was levied on the unapportioned gross receipts derived by General Motors from wholesale sales of motor vehicles, parts and accessories manufactured and sold wholly without the state and shipped to Chevrolet, Pontiac and Oldsmobile retail

dealers located in the state (R. 47-51). The amounts of gross receipts included in the assessment base and the taxes and interest related thereto have been settled by stipulation of the parties (R. 6-12, 48-51). The Appellees are the State of Washington and the Tax Commissioners of the State of Washington (R. 47).

The essential facts are incorporated in the statement of "Questions Presented". Less cryptically, they are:

General Motors manufactures, in California, Missouri and Michigan, but not in Washington, motor vehicles and parts and accessories therefor which it sells at wholesale to independent dealers, including dealers in Washington. The dealers send their orders to zone offices located in Portland, Oregon. Orders are accepted there or at the factories and sales are completed by shipments f.o.b. the factories. The zone offices assist the dealers with advice, and for that purpose have district managers, working out of the zone offices, who regularly call on dealers in defined territories in which the district managers reside, including some in Washington. District managers do not normally solicit or handle orders. There was no General Motors office or place of business in Washington that had any connection with the first class of transactions. As to the second class, there was a one-man office in Seattle which assisted dealers in Alaska and parts of Idaho and Washington, principally by expediting deliveries. (R. 12-19, 46-61)

While the foregoing states all the facts which we consider essential to the issues, the following more detailed statement may provide helpful background.

General Motors is a Delaware corporation qualified to do business within the State of Washington (R. 47). It owns and operates factories for the manufacture of auto-

mobiles, trucks, parts and accessories for sale at wholesale to independent retail dealers, including a number of such dealers located in Washington (R. 47-51, 55). No manufacturing facilities are located in Washington (R. 13, 47-48).

General Motors conducts much of its business through Divisions, not separately incorporated, which operate substantially independently of one another (R. 13, 47, 48). Some of these Divisions maintain offices in Washington and pay without dispute the tax on the transactions passing through such offices (R. 14). This appeal involves the transactions of only Appellant's Chevrolet, Pontiac, Oldsmobile and General Motors Parts Divisions and the taxability of gross receipts derived from their sales to Chevrolet, Pontiac and Oldsmobile dealers located within Washington (R. 48-51). All products involved in these transactions were manufactured, sold and delivered outside the state and shipped into the state pursuant to orders from the dealers (R. 47-48, 49). The orders were received at and processed through zone offices and a parts warehouse in Portland, Oregon, and the sales were completed by delivery and shipment from factories (sometimes warehouses) located outside the State of Washington, including factories at Oakland and South Gate, California; St. Louis, Missouri; and Lansing and Pontiac, Michigan; and a parts warehouse at Portland, Oregon (R. 14, 17-18, 47-48, 54, 56-57).

The field sales organizations of the Chevrolet, Pontiac and Oldsmobile Divisions are similar in most respects (R. 14). Each Division maintains a zone office in Portland, Oregon (R. 14-15). The geographical territory of each "Portland zone" includes Washington, Oregon and Alaska and variously parts of Idaho, Montana and Wyoming (R. 15, 53). The zone manager appoints dealers in appropriate

locations throughout his territory and (in Portland) executes with each a Dealer Selling Agreement (R. 16, 48). Thereafter, the zone manager and his assistants advise the dealer in the management of his dealership and check his compliance with the Dealer Selling Agreement, particularly through the efforts of a "district manager" (R. 16-17, 55).

A district manager ordinarily resides within his assigned territory, but has no office other than the zone office in Portland (R. 17, 56). A district manager does not accept or fill orders, approve credit, receive payment or make delivery (R. 55). His function includes serving as the zone manager's direct contact with the dealer at his place of business, receiving from him his complaints, observing his operations, reporting thereon to the zone office, and passing on to him such advice and counsel as the zone office can make available (R. 17).

Orders for motor vehicles are sent by the Washington retail dealers to the zone offices in Portland, Oregon (R. 17-18, 56). The orders are accepted (or rejected) at the zone office or factory, and if accepted are filled by shipment from the factory by common carrier, f.o.b. the factory (R. 18, 56-57). Payment is received and delivery is made at the factory (R. 18, 47-48, 56-57). By reason of the nature of General Motors' business, solicitation of orders is not a necessary or usual step in its sales procedures (R. 54).

The zone offices of Pontiac and Oldsmobile Divisions each had about twenty assigned personnel (R. 15). The Chevrolet office was somewhat larger (R. 18). Of these, Pontiac had never any more than three in Washington, Oldsmobile no more than six, and Chevrolet no more than seventeen (R. 5).

General Motors Parts Division warehouses and sells and ships to dealers parts and accessories for Chevrolet, Pon-

tiac, and Oldsmobile vehicles (R. 18, 59-60). It has a warehouse at Portland, Oregon, and another at Seattle, Washington, which stock different classes of items (R. 18-19, 59-60). Items carried by the Portland warehouse are ordered by the dealers directly from Portland, without any participation by the Seattle warehouse (R. 18-19, 56, 59-60). The Division has no field personnel visiting dealers (R. 446). General Motors has voluntarily paid and does not dispute the tax on the transactions of the Seattle warehouse (R. 19). Tax on gross receipts from sales from the Portland warehouse, not the Seattle warehouse, is contested here (R. 19, 50-51).

The Washington court divided Appellant's transactions into two classes. The first class included all Oldsmobile, Pontiac and General Motors Parts Division transactions, and part of the Chevrolet Division transactions, denominated Chevrolet Class "B", which consisted of sales through the Chevrolet Portland zone office to Chevrolet dealers located in the nine southern counties of the State of Washington (R. 21-22, 49-51, 439-454). The second class of transactions, denominated Chevrolet Class "A", consisted of sales to Chevrolet dealers in the balance of the State (R. 21-22, 50, 439-454). The foregoing description is applicable to both classes of transactions.

No office of Appellant's in the state had any contact of any kind with the transactions in the first class and every step therein on Appellant's part, from receipt and acceptance of an order to delivery of product and receipt of payment was performed at an office, warehouse or factory outside the state (R. 47-48, 54, 56). The respective transactions of the Chevrolet, Oldsmobile and Pontiac Divisions were in no way related to one another, and the transactions of the Portland warehouse of the Parts Division were in no way related to its Seattle warehouse (R. 56).

The second class of transactions, Chevrolet Class "A", consisted of sales through the Chevrolet Portland office to dealers in Washington other than in the nine southern counties of the state (R. 49-50). The sole factual difference between this class and the other is that here Chevrolet maintained a "branch office" in Seattle, consisting of one man and his secretary. Its or his function was to assist Chevrolet dealers in Alaska, part of Idaho and all of Washington except the nine southern counties, to give better service on orders and in particular to get faster delivery. This office did not solicit, receive, process, accept or see orders; it did not make franchise or credit approvals; and it did not receive payments, make deliveries or keep books. The branch manager had no jurisdiction over and did not establish contact with any other Chevrolet personnel in Washington, and no other personnel reported to, used or worked from this office. (R. 58-59)

The Superior Court held that all transactions of the first class were in interstate commerce and outside the territorial jurisdiction of the state and that the application of the statute would be repugnant to the Commerce Clause of, and the Due Process Clause of the Fourteenth Amendment to, the United States Constitution (R. 21-22, 61-62). It held, however, that the presence of the branch office in Seattle and its "direct connection" with the second class of transactions removed the constitutional immunity from that class (R. 21-22, 62). Judgment was entered accordingly (R. 65-67), and the State appealed (R. 67-68) and General Motors cross-appealed (R. 68-69) the respectively adverse portions of this judgment to the Washington Supreme Court which held that all transactions, both of the first and second classes, were taxable (R. 439-455).

It is possible to proliferate the detail but we think that doing so adds nothing to an understanding of the case and,

on the contrary, tends to obscure the essentials. The Washington Supreme Court made a lengthy review of such details (R. 439-446), and in the process confused General Motors' activities in the state with activities outside the state and with activities of the independent dealers.

SUMMARY OF ARGUMENT

> "Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern." *Nippert v. City of Richmond*, 327 U.S. 416, 431.

For the reason indicated in that quotation, we deem it helpful to consider the economics and practical aspects of the situation before examining the application thereto of rules of constitutional interpretation.

Economic Aspects

A tax on or measured by gross receipts may not be unconstitutional when applied to business wholly intrastate[2] but its economically unsound nature frequently leads to its unconstitutional application to interstate, multistate or extrastate business. Such a tax is unsound, wholly apart from its extraterritorial and interstate commerce overtones, because it tends to pyramid through successive applications to successive transactions and wholly disregards differences in the magnitudes of activities and benefits which are supposedly its subject and justification, respectively. This in-

[2] A strong argument could be made that even in such case equal protection is unconstitutionally denied in favoring vertically integrated businesses over businesses not so integrated.

herently capricious incidence of such a tax tends to obscure its inherent discrimination against interstate commerce. Such discrimination is aggravated when, as in this case, nearly all of the acts or incidents which produce the receipts occur without the state and only one taxable "incident" is found within the state, and the tax would be no heavier if all acts or incidents were within the state.

Apparently the reason for the Washington Supreme Court's straining to uphold the tax in this case is its adherence to the fallacious concept of the "market state": that the "market", rather than productive facilities and business activities, creates income; that a vendor "takes money out of the market" and should pay something in return. The fact is that the vendor puts as much value into the state as he takes out—if the product were not worth more to the purchaser than its price, he would not purchase it. It is a fact also that the state, in providing governmental services to the "market", is rendering such services to and for the benefit of its citizens who comprise the market, and not to the foreign vendor who deals with those citizens. A tax based on, and bearing a reasonable relation to, the vendor's activities, if any, within the state is justifiable; but not a tax based on the presence of customers.

Economic incidence of a tax is important to its constitutionality. If the tax is actually borne by a person who owes a duty to the taxing jurisdiction for equivalent benefits received, it meets the requirements for elemental fair play which is one of the tests of constitutionality, *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444. Income and franchise taxes are usually assumed to be borne by vendors, as distinguished from sales and use taxes which are assumed to be borne by purchasers. Any doubt as to the validity of that

assumption as to franchise taxes measured by gross receipts is dispelled for this particular tax by the statute itself which provides that the tax shall not be construed as a tax on purchasers but shall constitute part of the vendors' overhead.[3]

As a part of overhead, the tax is reflected in company-wide prices and comes out of customers generally, only a small percentage of whom are in Washington.

The economic impact of this decision, if it is allowed to stand, will be huge. It is a wholly novel approach to the taxation of interstate commerce which would seriously impede commerce, not only with Washington, but with other states eager to increase local revenues at the expense of foreigners. The fact that five trade associations filed herein *amicus curiae* briefs urging this Court to hear this appeal is eloquent testimony to the novelty and impact of the decision below.

First Question—Interstate Commerce

The first question is whether the tax imposed on these transactions is an unconstitutional regulation of interstate commerce or unconstitutionally exposes interstate commerce to multiple burdens.

A. In the light of prior decisions, this question seems to answer itself. "It is beyond dispute that a State may not lay a tax on the 'privilege' of engaging in interstate commerce". *Northwestern States Portland Cement Co. v. Minnesota—Williams v. Stockham Valves & Fittings, Inc.*, 358 U.S. 450, 458, citing *Spector Motor Service Inc. v.*

[3] RCW 82.04.500, p. 4a, *infra*.

O'Connor, 340 U.S. 602. The tax here is solely for the privilege of engaging in the business of making wholesale sales.[4] The taxed sales were made in other states, followed by shipment of goods from other states to customers within the state[5] (R. 47-48, 54). This is pure interstate commerce, and there was no separable intrastate business, the minimal activity within the state being exclusively in furtherance of that interstate commerce.

B. Because of its inherently discriminatory nature, a tax on the unapportioned gross receipts of interstate commerce is invalid. *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, involving this same tax as applied to outshipments. The rule is the same for in-shipments. *West Point Wholesale Grocery Co. v. City of Opelika*, 354 U.S. 390, involving a flat amount tax.

C. This tax, if applied as the Washington Supreme Court would apply it, leads directly to prohibited multiple burdens on interstate commerce merely because it is interstate commerce. If the insubstantial elements of "wholesale selling" (as characterized by that court) that took place in Washington form the basis for a tax, *a fortiori* the much more substantial elements of the same wholesale sales which took place in other states justify taxes by those states. The Commerce Clause prevents such a result. *Nippert v. City of Richmond*, 327 U.S. 416.

D. An unapportioned gross receipts tax for the privilege of engaging in business is valid only if the business is local and the privilege is intrastate commerce, realistically separable from interstate commerce. *Norton Company v. Department of Revenue*, 340 U.S. 534. The Seattle warehouse of General Motors Parts Division is such a local busi-

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[4] RCW 82.04.270, p. 2a, *infra*.

[5] "'Sale' means any transfer of the ownership of, title to, or possession of property for a valuable consideration * * *." RCW 82.04.040, p. 1a, *infra*.

ness (R. 18-19, 59-60). The tax is paid with respect to its transactions without dispute (R. 18-19). The transactions involved in this appeal had no connection with that store nor with any other place of business in the state (R. 54, 56). They are not in any sense local business nor intrastate.

E. The presence of Chevrolet's so-called "branch office", added to the factors relevant also to the first class of transactions, does not make the second class of transactions taxable. The one man in that office merely advised and assisted dealers. To the extent that his activities were related to sales at all, it was merely to expedite the interstate shipments. *Alpha Portland Cement Company v. Massachusetts,* 268 U.S. 203.

Second Question—Interstate Commerce

The inherently unsound nature of a privilege tax measured by gross receipts and its inherent discrimination against interstate commerce show up strikingly in the circumstances of this case. In separate sections, the statute imposes the tax for the privilege of manufacturing[6] and for the privilege of selling.[7] In a third section it provides that if the tax is paid for the privilege of selling it need not be paid also for the privilege of manufacturing.[8] The result is that the tax is exactly the same whether the taxpayer (a) manufactures in the state and sells elsewhere; or (b) manufactures elsewhere and sells in the state; or (c) both manufactures and sells in the state. In our case, both manufacturing and selling take place outside the state, but the

[6] RCW 82.04.240, p. 2a, *infra.*

[7] RCW 82.04.270, p. 2a, *infra.*

[8] RCW 82.04.440, pp. 3a-4a, *infra.*

Washington Supreme Court has treated the business as if it came under category (b). Even if that treatment were correct, application of the tax to these circumstances develops the risk of multiple taxation of interstate commerce, not borne by local commerce, which the Commerce Clause forbids. *Freeman v. Hewit*, 329 U.S. 249.

In this case, there is more than the mere threat of multiple exposure—there is actual double taxation. Some of the products sold to Washington customers are manufactured in St. Louis, which city has a gross receipts tax essentially the same as Washington's.* The products manufactured in St. Louis pay a tax there for the privilege of manufacturing, and another to Washington for the privilege of selling. Only one such tax would be payable if the products were sold in St. Louis or if they were manufactured in Washington. The fact that a tax bears uniformly upon operations entirely within the state (this one does not) does not validate its discrimination against interstate commerce. *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64.

Third Question—Due Process

A Washington tax reasonably related to the minimal activities of General Motors employes in the state would be unassailable on due process grounds. *International Shoe Co. v. State of Washington*, 326 U.S. 310. This is not such a tax. It is laid on the privilege of doing things—making sales—which are done almost exclusively without the state, and measured by the entire unapportioned gross receipts of the aggregate of all the extra-state activities, manufacturing as well as selling. Washington is thus attempting to tax privileges which are not granted or protected by Washington, but by Oregon, California, Missouri and Michigan. This is a wholly unwarranted extension of the state's jurisdiction

* Appendix B, pp. 5a-6a, *infra*.

to events and values beyond its borders and a deprivation of property without due process of law. *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 330. Entirely aside from the due process clause of the Fourteenth Amendment, such extraterritorial exertion of state power is unconstitutional since a state has no jurisdiction beyond its borders. *New York, Lake Erie and Western Railroad Company v. Pennsylvania*, 153 U.S. 628.

Even if the minimal in-state activities of General Motors employes are sufficient to provide the "definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax", *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344, which is doubtful as to the sales here taxed, the tax still goes far beyond the permissible bounds of due process because its measure "bears [no] fiscal relation to the protection, opportunities and benefits given by the state". *Wisconsin v. J. C. Penny Co.*, 311 U.S. 435, 444. A tax which is not properly apportioned to business done within the jurisdiction denies due process. *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123.

ARGUMENT

ECONOMIC ASPECTS

There are two fundamental reasons for the incorrect legal result reached by the Supreme Court of Washington in this case. They are fiscal and economic, rather than legal or constitutional, but they led the Court to an incorrect application of constitutional principles. It is necessary to examine them to understand the Court's holding.

Three Types of Taxes

It may be helpful at the outset to distinguish among three types of taxes: (1) net income taxes; (2) sales and use taxes; and (3) franchise taxes measured by unappor-

tioned gross receipts. This distinction is of great importance because of differences in economic incidence, or who bears the burden of the tax. Other relevant distinctions are: between apportioned net income taxes and franchise taxes measured by apportioned net income; between sales and use taxes; and between apportioned and unapportioned gross receipts taxes.

Economists are unwilling to state categorically where the burden of any tax actually falls, and it would be rash for lawyers to attempt to do so. The question should not be ignored, however, because its answer is the key to one of the important considerations in determining whether a given tax in given circumstances is constitutionally infirm. A tax is constitutionally in much better shape if it is borne by a person who owes a duty, for benefits received, to the taxing jurisdiction, in some rough equivalence to the amount of the tax. For that reason, assumptions are made, including, at least implicitly, by this Court, that tax burdens fall where they are intended to fall or where they would fall but for suspected, though subtle and unidentifiable, shifting. Such assumptions are sufficiently accurate and entirely valid for this purpose.

As applied to the three types of taxes here distinguished, these assumptions are: (1) the burden of net income taxes, including franchise taxes measured by net income, falls on the income taxed and hence on its owner; (2) sales and use taxes are added to price and hence are paid by the purchaser; (3) the burden of franchise taxes measured by gross receipts falls on the person exercising the franchise. There might be argument that under some circumstances there would be no such difference between categories (2) and (3), but the Washington legislature has foreclosed any such discussion in this case by specifically providing that

its category (3) tax here involved is to be absorbed by the vendor as part of its general overhead, RCW 82.04.500. The result is to increase prices to all the vendor's customers, wherever located.

Tested by these considerations, the tax in this case does not come into court with clean hands. Since it is reflected in company-wide prices, it comes out of customers generally, only a small percentage of whom are in Washington. This is in sharp contrast to a sales or use tax, which would be paid by customers in Washington, receiving the benefits of the state's protection and services and having the power through their elective franchise to direct the use of the tax or repeal it altogether. It contrasts similarly with a net income tax properly apportioned to the contribution which General Motors' minor activities in Washington make to its total income.

Basic Unsoundness of This Tax

One of the fiscal and economic problems which the Washington Supreme Court did not recognize is the unsound nature of the tax—a tax for the privilege of engaging in business measured by the gross receipts thereof. It is difficult to make a logical determination of the applicability of the tax to a specific circumstance when the whole tax is illogical. The tax is inherently discriminatory. Suppose, for example, that a vertically integrated organization owns forest lands from which it takes a tree, a lumber mill in which it processes the tree into lumber, a furniture factory in which it manufactures the lumber into a table, and a store in which it sells the table to a user. Since there has been only one sale there is only one tax.

Suppose further that another table has a different history. The tree is sold to a lumber mill, which sells the lumber to a furniture manufacturer, who sells the table to a wholesaler who sells to a retailer who makes the final sale. Five sales, five taxes.

Whether there is one tax or five depends not on the substance of the taxed activity, nor upon the protection and benefits conferred by the state, but upon the wholly irrelevant matter of the form of business organization. It may very well be that the five separate businesses in the second example could establish that they are being denied their constitutional right to protection of the laws equal to that accorded to their integrated competitor in the first example.

There is no need to consider here, however, whether the economic unsoundness of such discrimination results in its constitutional unsoundness also when all the operations of all the taxpayers are within the taxing jurisdiction. The fact that the entire tax is uneven and capricious in its application tends to obscure its discrimination against interstate commerce. However, the fact that there is discrimination as among persons engaged in intrastate commerce does not excuse discrimination against interstate commerce:

> "It [a state] cannot justify what amounts to a levy upon the very process of commerce across States lines by pointing to a similar hobble on its local trade," *Freeman v. Hewit*, 329 U.S. 249, 254.

This Court has recognized that this type of tax is inherently discriminatory against interstate commerce. In distinguishing the apportioned net income taxes involved in *Northwestern States Portland Cement Co. v. Minnesota—Williams v. Stockham Valves & Fittings, Inc.*, 358 U.S. 450, this Court said, at page 462:

> "This is not an unapportioned tax which by its very nature makes interstate commerce bear more than its fair share."

The working out of the discrimination and double taxation in this case is developed hereinafter. At this point we wish merely to observe that the unsound, discriminatory nature of the entire concept of this tax makes it hard to rationalize the rules for its application and no doubt contributed confusion to the State court's deliberations.

The "Market State" Concept

The second obstruction to the State court's reaching a correct result was its preoccupation with the "market state" concept. This shows clearly in the key sentence in its opinion (R. 450):

> "Although the mechanical aspects of the wholesale sales of General Motors to retail dealers occur outside of the state, the substance of each transaction occurs in Washington *where the customer is located and where the demand for the manufactured product exists,* in very large degree, as a result of General Motors promotional activities." (Emphasis supplied.)

It appears also in the general tone of the whole opinion, as well as in prior pronouncements of the same court. In *B. F. Goodrich Co. v. State of Washington,* 38 Wn. 2d 663, 231 P. 2d 325, for instance, it was quite evident that the court was of the view that Goodrich morally owed tax to Washington with respect to every sale to a Washington customer, and very reluctantly concluded that it was bound by this Court's decision in *Norton Company v. Department of Revenue,* 340 U.S. 534, to permit Goodrich to escape that obligation with respect to two classes of transactions. Said the Court, at 231 P. 2d 325, 331-2:

> "Whatever we may think of this distinction [between the use tax involved in *Nelson v. Sears, Roe-*

buck & Co., 312 U.S. 359, and the franchise tax involved in *Norton Co. v. Department of Revenue*, 340 U.S. 534] from the standpoint of practical effect, our only concern with it here is that it has been made and must be observed. In accordance with it, we are compelled to hold that the Class E sales, involving orders sent by the purchasers directly to an office out of the state, and filled by shipment direct to the purchaser, without any intervention on the part of the local office, cannot constitutionally be made the subject of the tax here involved.

* * * * *

"Were we free to decide this case differently, we might well do so. Numerous questions must necessarily follow from the conclusions we have here reached. Does the limitation of the operative effect of this tax to what is found to be intrastate commerce actually protect interstate trade from an unjustified levy, or does it merely allow to that trade a special and unwarranted exemption which local business is not permitted to enjoy? And even if we assume that this sort of taxation, if applied to interstate commerce, would have the inhibitory effect which the supreme court has held the constitution sought to forbid, have we removed that burden when we subject receipts of certain sales to taxation merely because they were made with the assistance of a local outlet of a corporation, while at the same time allowing those sales, made through out-of-state branches of the same company, to go tax free?

* * * * *

"It scarcely needs be said that, with respect to matters involving the Federal constitution, we, as an inferior tribunal, must follow the pronouncements of that [United States Supreme] court no matter what our private views may be."

Three of the nine judges who subscribed to that sentiment in 1951 were still on the bench in 1962 and concurred in the opinion written by one of them in this case.

If we were dealing with a sales or use tax, which normally falls on the purchaser, there would be reason for the court's point of view. As Mr. Justice Rutledge well said in his opinion concurring in *General Trading Co. v. State Tax Commission*, 322 U.S. 335, and *International Harvester Co. v. Department of Treasury*, 322 U.S. 340, and dissenting in *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, at page 361, writing of *sales and use taxes:*

> "If in this case it were necessary to choose between the state of origin and that of market for the exercise of exclusive power to tax, or for requiring allowance of credit in order to avoid the cumulative burden, in my opinion the choice should lie in favor of the state of the market rather than the state of origin. The former is where the goods must come in competition with those sold locally."

When the *consumer* is paying the tax, it is right and proper that it be paid to the jurisdiction which renders services to the consumer. But this is not that type of tax. The statute specifically imposes it upon the supplier, not the consumer:

> "It is not the purpose of this title that the taxes herein levied upon persons engaging in business shall be construed as taxes upon the purchasers or customers, but it is the intention that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons engaging in business." R.C.W. 82.04.500, p. 4a, *infra*.

It is apparent that the Supreme Court of Washington has fallen for the fallacious economic concept of the "market state". The argument runs this way: when products are sold by an out-of-state manufacturer to residents of

the state, that alien manufacturer is "taking money out of the state". Hence, he should be required to put some back in the form of a contribution, not to his customers as a reduction in price, but to the state itself. Another version of the same story is that a market is as essential to trade as is production, and that the protection and benefits which the state affords to the persons who constitute the market should be paid for by the supplier.

It seems amazing that the mere statement of these propositions does not convince everyone that they carry their own refutation. The Supreme Court of Washington is not, however, alone in succumbing, and legal writers (never economists or fiscal experts) have not infrequently expressed similar views. *This* Court does not fall into that error, and has frequently and emphatically repudiated the idea. Most succinct of its statements was in *Stratton's Independence, Limited v. Howbert*, 231 U.S. 399, where it was said at page 415:

> "* * * 'income' may be defined as the gain derived from capital, from labor, or from both combined * * *"

That statement has often been quoted and reiterated by this Court: *Doyle v. Mitchell Bros. Co.*, 247 U.S. 179, 185; *Eisner v. Macomber*, 252 U.S. 189, 207; *Merchants' Loan & Trust Company v. Smietanka*, 255 U.S. 509, 517; *Bowers v. Kerbaugh-Empire Company*, 271 U.S. 170, 174; *National Carbide Corp. v. Commissioner*, 336 U.S. 422, 437; *Commissioner v. Culbertson*, 337 U.S. 733, 740.

"Market State" vs. "Producer State"

Another aspect of the fallacy is the imaginary distinction between "market state" and "producer state", not as to individual transactions, but as to the totality of the state

economy. There is no difference. Each state is equally a "producer" and a "market". Upon a little reflection, it is obvious that, over a reasonable period of time, each state's imports and exports must exactly balance.[10] The frequently heard argument that, by selling something to a person in the local market a foreign producer is "taking money out of the community" is wholly erroneous.

It is convenient, as Adam Smith did in his "Wealth of Nations" a century and a half ago, to revert to analysis of a barter economy. Washington produces apples, California produces oranges. If the proprietor of a Washington orchard and the proprietor of a California grove exchange a box of apples for a box of oranges, each makes a profit—the apples are worth more than the oranges to the Californian, and the oranges are worth more than the apples to the Washingtonian. If that were not so, there would be no exchange. Hence, it is nonsense to argue, as the proponents of the "market state" concept do, that Washington has taken oranges "out of" California, or that California has taken apples "out of" Washington. Washington has put apples into California, and California has put oranges into Washington, as a result of which the wealth of each state is increased.

Bringing the transaction up to date in our money and credit economy injects opportunity for confusion but no change in principle. The apple grower sells the box of apples (along with many other boxes) to a distributor in Washington, who sells to a dealer in California, who sells to the orange grower. The box of oranges takes a similar

[10] There can be temporary exceptions: if one state is importing capital, it will be building up debt and its imports will exceed its exports to that extent. Since all states are now increasing their own capital from within, this theoretical exception has no practical existence today.

route into the hands of the apple grower. Money (or credit) is used to represent the value of the fruit at each step. Still, the apple grower has not "taken money out of" California, nor the orange grower out of Washington. As in the barter example, there has merely been an exchange, benefiting both parties and hence both states, with money used as a lubricant to facilitate the operation.

Complicate the situation by supposing that the orange grower doesn't like apples, and that, having obtained the apple grower's money for a box of oranges, he spends it elsewhere, perhaps for a box of Hawaiian pineapples. But since the apple grower can obtain money only by selling apples, the transaction is incomplete until we add another step, and that step is the sale of a box of apples to someone in Hawaii.

Oversimplified as it is, that last example nevertheless contains every element of our complex economy. Actually, of course, Washington produces many products in great quantity and ships them all over the world, and imports many products, including automobiles, from all over the world. But it imports no more than it exports, because it must use the proceeds of exports to pay for the imports. The automobile producer does not "take money out of" Washington when he sells an automobile to a Washington customer. He exchanges the automobile, directly or indirectly, for apples, lumber and fish produced in Washington.

The proponents of the "market state" concept, including the Supreme Court of Washington, cling to the tenet that the purchaser benefits the supplier, overlooking the obvious fact that the purchaser must also be benefited, else he wouldn't trade.

If the market state concept had any validity, it would apply to many situations where no attempt is now made to apply it, for various reasons. In our third example above, we assumed that the California orange grower sold to a distributor in California, who in turn made a sale in Washington. Obviously, the orange grower is in that case just as much "taking money out of" Washington as if he were selling directly to Washington customers, and his obligation to return something to the state is just as great; and yet since his own direct customer, the distributor, is in California, no one supposes he can be required to pay a tax to Washington.

Another example further emphasizes the absurdity of the concept. A resident of Washington, on a vacation tour, finds a resort hotel to his liking in Palm Springs, California, and spends a week and considerable money there. The hotel has just as much "taken money out of" Washington as has the orange grower. The concept requires it, too, to return a contribution to that state. It would make no difference if the Washington resident had been led to the hotel by an advertisement in a Seattle newspaper. If the hotel maintained an office in Washington for soliciting business, making reservations, billing, and other activities, it might be subject to some Washington tax. That, however, would be because of its activities in Washington, and not because it was taking anything from the state. A similar office engaged in the purchase of timber for an out-of-state mill would have a similar tax liability, although it would, according to the "market state" concept, be "putting money into" the state rather than taking it out.

Although there appears to be no support for the "market state" concept in the writings of economists, and indeed their teachings are strongly to the contrary, there has been

very little occasion for succinct, quotable statements on the subject, perhaps because the concept is at war with the basic economic principle that wealth is produced by capital and labor, not by markets. There are, however, some few such expressions, of which three examples will suffice.

The late Professor Paul Studenski, renowned scholar of public finance and fiscal adviser to governments including the State of New York, writing an article for Virginia Law Review's 1960 "Symposium on State Taxation of Interstate Commerce", said (46 Va. L.R. 1121, *et seq.*, 1129-32):

> "The newly introduced state corporation income taxes on corporations which merely solicit orders in the state and operate no manufacturing plants, warehouses, stores or full-fledged offices in it, are unsound economically and fiscally in several major respects. Their faults may be summarized under nine heads * * *
>
> "A. *Lack of Justification on Any Rationally Conceived Benefit Principle*
>
> "The imposition of these levies is being justified by their protagonists in the market states by a reasoning which runs about as follows: The state of the market—frequently referred to as the state of the consumers—furnishes the money from which the out-of-state producer obtains his profit. Without the market there would be no profit * * * The place of consumption contributes to the profit of the producer just as much as the place of production * * * The market state, therefore has at least an equal claim with the manufacturing state for taxing the profit of the producer * * *
>
> "This reasoning contains two independent arguments: (1) the *government* of the market state confers valuable benefits on the out-of-state producer * * *, and (2) the *consumers* of the market state by their patronage confer valuable benefits upon him.

"The first argument exaggerates the extent of the benefits conferred by the govenment of the market state upon the out-of-state producer. Actually, the benefit involved is very modest and very indirect * * * The protective services furnished by the governments of the market states to the out-of-state producers * * * exist only because in their absence the out-of-state producers would not ship goods into the state and their customers would have to get along without them * * *

"The second argument, that the *consumer* furnishes a profit to the out-of-state producer and therefore the consumer's state is entitled to tax the producer's profit, is fallacious. It flies in the face of the most elementary facts of economics * * * The profit is produced not by the efforts of the consumer, but by those of the producer * * * The consumer does not confer any benefit upon the producer for which he does not receive an equivalent benefit * * * The whole theory of benefit conferred by the consumer on the out-of-state producer as a basis for taxing the latter on its income represents a most extraordinary combination of irrelevant and misleading propositions lacking either rhyme or reason * * *

"One of the worst features of the use of sales-by-destination in allocation formulas is that it permits the low income states to appropriate to themselves resources belonging to the high income states."

Professor C. Lowell Harriss has written to the same effect (49 Amer. Econ. Rev. Vol. 3, pp. 398, 399-400 (1959)):

"The failure of states to achieve greater harmony [in net income tax apportionment formulae] results in part from the desire of some states to 'import' income for tax purposes. Choice of one as against another allocation formula can permit just this re-

sult. For example, a state whose residents buy more manufactured goods from outside than they 'export' can decree that a large part (or all) of business net income originates where the products are sold, i.e., where buyers live. The place where the goods are made is held to be unimportant. Adjustment of the elements of the formula and of their weighting to take account of the nature of a state's economy can make a difference in the state's tax base. Legislatures can reach out and tax 'foreigners', corporations (stockholders, consumers, employees, or whoever bears the corporation tax) who have no vote in the state. Any state is now free to decree that some condition which does not in fact create income shall be assumed for tax purposes to be the source of income. • • •

"The most widely used basis for income allocation is the 'Massachusetts formula'. Property, payrolls, and sales (receipts) are employed and weighted equally. • • • But use of the sales (receipts) factor has little—or no—economic justification. Human effort produces income. Use of property produces income. Selling and purchasing, however, do *not* produce income except as human effort and property are involved. Although selling is, of course, a part of the income-creating process, its contribution is represented not by the dollar volume of sales but by the remuneration of the human and material resources that perform the selling function. To assign sales an independent importance is to depart from economically proper apportionment. • • • I submit that a formula based on economic reality will accord no separate or distinct place to sales."

In a very recent study, Professor Charles E. Ratliff, Jr., has expounded the same principle and concludes:

"The property-payroll formula is theoretically sound and is also superior to alternative formulae

> on such criteria as simplicity, certainty, administrative and compliance costs, and effect on resource allocation and economic growth. Inclusion of a sales factor, whatever the basis of sales, cannot be economically justified under the contribution-to-income approach; and the sales factor is the one responsible for most of the practical difficulties."—"Interstate Apportionment of Business Income for State Income Tax Purposes", University of North Carolina Press, 1962, p. 115.

Professor Studenski, Professor Harriss and Professor Ratliff were all writing about apportionment of net income taxes, and made the point that gross receipts, particularly when allocated to the state of the consumer as such, are not even a proper consideration as an apportionment factor. Their expositions apply *a fortiori* to a tax on unapportioned gross receipts alone.

The Washington tax is not in terms a tax on the privilege of having customers, and if it were it would surely be an interference with interstate commerce in violation of the protection given to such commerce by the Constitution of the United States. Nevertheless, the Supreme Court of Washington is applying it in that manner.

Impact of the Decision

There is no support for the Washington court's holding in any prior decision of this Court, and there are many decisions of this Court to the contrary on both interstate commerce and due process grounds. It is a wholly novel decision, upsetting understandings which tax collectors and taxpayers alike have had for years. It is shocking to great groups of taxpayers, many of them represented by the five trade associations—Automobile Manufacturers Associa-

tion, Electronics Industries Association, Magazine Publishers Association, National Association of Manufacturers, and National Coal Association—which filed briefs *amicus curiae* herein asking this Court to hear this appeal. No other state or local taxing jurisdiction has thus far sought to impose taxes upon such a thin basis and on a measure so unrelated to benefits conferred. The damage which this decision, if allowed to stand, would do to interstate commerce is enormous. Not only would it hamper trade with Washington, but its inevitable extension to the other states and cities that now have this type of tax and to still others who would like to adopt this easy method of making foreigners pay for benefits for the local citizenry would create a whole series of interstate tariffs, exacting a toll from business done entirely elsewhere and elsewhere amply taxed.

Effect on Local Governments and Competition

This Court has frequently expressed its disapproval of the nature of an unapportioned gross receipts tax as a means of taxing interstate commerce, and has consistently held that such a tax may not be imposed upon exclusively interstate commerce. It has, however, accommodated the argument that interstate commerce must bear burdens equivalent to intrastate commerce by permitting the taxation of local activities, sufficient to constitute intrastate business, measured by the proceeds of the interstate commerce of which the local activities were a part. *Norton Company v. Department of Revenue*, 340 U.S. 534.

That argument, however, is unsound and the accommodation is unnecessary. The argument assumes that the states not only can but must use that type of tax. The fact is that very few states now do (in addition to Washington,

we believe only Indiana and West Virginia), plus a number of municipalities. It is not true that if by federal law, constitutional or statutory, a particular tax is forbidden for federally protected commerce or instrumentalities the burdens of the federally protected will be lightened and the burdens of competitors not so protected will be increased. An excellent example is R.S. §5219 (44 Stat. 223, 12 U.S.C. §548), which severely limits the ways in which states may tax national banks. The result has not been to impose any competitive disadvantage on state banks. Instead, national banks contribute their full share through one or more of the permitted methods, and state banks are generally taxed in exactly the same way. Equality is achieved by the voluntary action of the states in refusing to impose upon those whom Congress cannot protect the types of burdens which Congress thought improper for those it can protect.

If immunity of interstate commerce from unapportioned gross receipts taxes were thought to result in a competitive disadvantage to intrastate competition, the states have at hand ample remedies. Interstate commerce pays its full way under many other types of taxes. States may tax its apportioned net income, *Northwestern States Portland Cement Co. v. Minnesota—Williams v. Stockham Valves and Fittings, Inc.*, 359 U.S. 450; or its property, at its value enhanced by the interstate business, *Adams Express Company v. Ohio*, 165 U.S. 194, 166 U.S. 185; or its use of locally provided facilities, such as roads, *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653; or the value which it adds to property or in services, *Armco Steel Corporation v. Michigan*, 102 N.W.2d 552, app. dis. 364 U.S. 337; or its capital, at its value enhanced by the interstate business, *Ford Motor Co. v. Beauchamp*, 308 U.S. 331; or the use of its products, *Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577.

The unapportioned gross receipts tax, if it ever had a proper place in systems of taxation, is now an anachronism which most states have abandoned and all states can afford to abandon in favor of the more sophisticated taxes more recently developed and now well known and widely used. It is the clumsiest weapon in the tax arsenal with innate inability to confine its charge to the target (local business) at which it is supposedly aimed, striking also the innocent bystander who ventures near though not into the target area.

FIRST QUESTION—INTERSTATE COMMERCE

A. The tax is invalid as a levy on the privilege of engaging in interstate commerce.

The first question (pp. 2-3, *supra*) is the broad one whether a state may tax the privilege of engaging in interstate commerce which the Constitution guarantees and confides to the exclusive control of Congress and measure the tax by unapportioned gross receipts.

In terms of this question, there are three types of commerce: *intra*state, *inter*state and *extra*state. We assume that a state may impose a non-discriminatory tax, measured by unapportioned gross receipts, upon the privilege of engaging in a separable intrastate business, such as the activities of the General Motors Parts Division warehouse in Seattle which involved sales from local inventories to local customers (R. 18-19, 59-60).[11] However, it is settled

[11] For the reasons discussed under "Economic Aspects", pp. 19-20, *supra*, a tax measured by unapportioned gross receipts is so uneven and capricious in its burdens as among various types of business arrangements, particularly with respect to the single-taxed vertically integrated business and the multiple-taxed non-integrated businesses, that it may be an unconstitutional denial of equal protection even as to wholly intrastate commerce. We have no occasion to examine this point further because this appeal involves no intrastate commerce but only extrastate and interstate commerce.

that the Commerce Clause absolutely forbids a state tax, however measured, upon the privilege of engaging in purely interstate commerce, even though that commerce is furthered by substantial in-state activities: *Cheney Brothers Company v. Massachusetts,* 246 U.S. 147; *Alpha Portland Cement Company v. Massachusetts,* 268 U.S. 203; *Spector Motor Service Inc. v. O'Connor,* 340 U.S. 602; and *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 342 U.S. 389.

Mr. Justice Clark, speaking for the majority in *Northwestern States Portland Cement Co. v. Minnesota—Williams v. Stockham Valves & Fittings, Inc.,* 358 U.S. 450, 458, described *Spector* as one of the "firm peaks of decision which remain unquestioned" out of some three hundred full-dress opinions of this Court dealing with state power to tax interstate commerce, stating "Moreover, it is beyond dispute that a State may not lay a tax on the 'privilege' of engaging in interstate commerce, *Spector Motor Service v. O'Connor,* 340 U.S. 602 (1951)". *Spector* holds that the Commerce Clause prohibits a non-discriminatory tax on the privilege of doing business within a state when applied to commerce that is exclusively interstate, even though the measure of the tax is *net* income fairly apportioned to substantial activities within the state. *A fortiori* such a tax measured by *unapportioned gross receipts* is invalid.

The taxpayer in *Spector* was engaged exclusively in the interstate transportation of freight by motor truck. It made shipments to and from customers in Connecticut and maintained two freight terminals there. The tax was assessed, in the language of the statute, as "a tax or excise upon its franchise for the privilege of carrying on or doing business within the state," 340 U.S. 602, 603-04. In striking down the tax as applied, the Court stated, 340 U.S. 602, 608-09, 610:

"The answer in the instant case has been made clear by the courts of Connecticut. It is not a matter of labels. The incidence of the tax provides the answer. The courts of Connecticut have held that the tax before us attaches solely to the franchise of petitioner to do interstate business. The State is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the State. Those taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the State and nondiscriminatory.

* * * * *

"In this field there is not only reason but long-established precedent for keeping the federal privilege of carrying on exclusively interstate commerce free from state taxation. To do so gives lateral support to one of the cornerstones of our constitutional law—*McCulloch v. Maryland, supra.*"

Likewise the answer in this case has been made clear by the language of the statute and its application. The Washington Business and Occupation Tax is a privilege tax levied by RCW 82.04.220 for "the act or privilege of engaging in business activities." In finding that this statute applies to the General Motors activities and transactions involved in this Appeal, the Washington Supreme Court decided (R. 447):

"The business and occupations tax statute, RCW 82.04.220, imposes a tax on the privilege of engaging in business activities. General Motors accomplishes wholesale sales of its products to retail dealers within the state. Part of the activities involved in these wholesale sales take place else-

> where; *e.g.*, orders are filled, delivery made, and payment is received outside of the state. *Nonetheless, business activities having a relation to wholesale sales are conducted in Washington. These activities provide an incident upon which the taxing statute operates.*" (Emphasis added.)

The statute taxes the business of making wholesale sales in the state. It does not purport to tax activities merely "related" to sales. By finding that "business activities having a relation to wholesale sales are conducted in Washington" and that such "activities provide an incident upon which the taxing statute operates," the Court below has held that a state may now tax the privilege of engaging in activities exclusively in interstate commerce.

The Washington Supreme Court does not in terms find any intrastate commerce nor any realistically separable local business. It sustains the tax upon a lengthy description, unsegregated, of not only General Motors' in-state activities but its out-state activities as well and also activities of its retail dealers, creating the impression of extensive taxable business activity (R. 439-447). It is not, however, the number of words taken to describe business activity that gives rise to tax liability. The controlling consideration is the *character of General Motors'* in-state activities, not those of its customers, nor what it does elsewhere.

These activities are nothing more than promotional and service efforts by traveling representatives in furtherance of the out-state manufacture, sale and delivery of General Motors products for shipment across state lines to Washington retail dealers by checking on the dealers' performance of their Dealer Selling Agreements and assisting them, principally by advice and information, with respect to the conduct of their retail businesses. The taxed transactions resulted from orders received and accepted at offices, warehouses or factories located outside the state.

The products were delivered and shipped directly to the dealers by common carrier, f.o.b. factory or warehouse, at which payment was received. The commerce culminating in the taxed transactions is predominantly extrastate except for such interstate shipments and the above-mentioned services in furtherance of such extrastate and interstate commerce. There is no intrastate commerce except that of the dealers which, of course, is fully taxed as such. (R. 12-19, 46-60)

Under these circumstances, the effect of the decision below is to sustain an unapportioned gross receipts tax imposed directly and solely on the privilege of engaging in exclusively interstate commerce or on extrastate commerce having minimal in-state aspects, contrary to the holding in *Spector Motor Service Inc. v. O'Connor*, 340 U.S. 602. In the *Cheney Brothers Co.* portion of *Cheney Brothers Company v. Massachuetts*, 246 U.S. 147, the court struck down a state tax on the privilege of doing local business as applied to a foreign corporation maintaining a local office which was engaged in soliciting orders for out-of-state acceptance and shipment directly to the customers. A similar privilege tax was invalidated in *Alpha Portland Cement Company v. Massachusetts*, 268 U.S. 203, as applied to a foreign corporation maintaining an in-state sales office engaged solely in interstate commerce, the court stating, 268 U.S. 203, 217: "Any such excise burdens interstate commerce and is therefore invalid without regard to measure or amount." *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389, relying on *Spector*, which was recently approved in *Northwestern States Portland Cement Co. v. Minnesota—Williams v. Stockham Valves & Fittings, Inc.*, 358 U.S. 450, 458, held invalid a Mississippi privilege tax upon soliciting business for a laundry not licensed in the state as applied to a foreign corporation

doing no business in the state other than sending its trucks there to solicit business, pick up, deliver, collect for laundry and cleaning. *Cheney Brothers, Alpha Portland Cement, Spector, Memphis Steam Laundry* and *Northwestern States* establish a line of decisions, as traceable as that of the "drummer" cases,[12] which probibits the application of the Washington privilege tax to the activities and transactions involved in this Appeal.

B. The tax is invalid as a levy on unapportioned gross receipts from interstate commerce.

The tax here was assessed against General Motors for the privilege of engaging in interstate business within Washington. It was measured by the unapportioned gross receipts from interstate sales related to that business, all intrastate sales having been separately and fully taxed. It is invalid for both reasons. A direct unapportioned tax on gross receipts from interstate commerce has been definitely held beyond state taxing power ever since *Fargo v. Michigan*, 121 U.S. 230, and *Philadelphia and Southern Steamship Company v. Pennsylvania*, 122 U.S. 326 and more recently in *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U.S. 650; *Puget Sound Stevedoring Co. v.*

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[12] A tax on the solicitation of interstate business is a tax on interstate commerce itself, *Robbins v. Shelby County Taxing District*, 120 U.S. 489. Cases following the *Robbins* decision include: *Corson v. Maryland*, 120 U.S. 502; *Asher v. Texas*, 128 U.S. 129; *Stoutenburgh v. Hennick*, 129 U.S. 141; *Brennan v. Titusville*, 153 U.S. 289; *Stockard v. Morgan*, 185 U.S. 27; *Caldwell v. North Carolina*, 187 U.S. 622; *Rearick v. Pennsylvania*, 203 U.S. 507; *Dozier v. Alabama*, 218 U.S. 124; *Crenshaw v. Arkansas*, 227 U.S. 389; *Rogers v. Arkansas*, 227 U.S. 401; *Stewart v. Michigan*, 232 U.S. 665; *Davis v. Virginia*, 236 U.S. 697; *Real Silk Hosiery Mills v. City of Portland*, 268 U.S. 325; *Best & Company, Inc. v. Maxwell*, 311 U.S. 454; *Nippert v. City of Richmond*, 327 U.S. 416.

State Tax Commission, 302 U.S. 90; *J. D. Adams Manufacturing Co. v. Storen*, 304 U.S. 307; *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434; *Freeman v. Hewit*, 329 U.S. 249; *Joseph v. Carter & Weeks Stevedoring Co.*, 330 U.S. 422; *Railway Express Agency, Inc. v. Virginia*, 347 U.S. 359.

Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 involved the very tax here asssessed against General Motors and is controlling on this point. The taxpayer, a Washington corporation, maintained its principal office in Washington. Its business was that of marketing agent for fruit growers and growers cooperative organizations in Washington and Oregon. As such, it made sales and deliveries of fruit in other states and foreign countries, collected the sales prices and remitted the proceeds to its principals after deducting transportation charges, certain expenses and its own compensation at the rate of 8 cents for a box of apples and 10 cents for a box of pears. Its representatives at numerous points outside Washington negotiated sales, executed written contracts of sale, effected delivery of the fruit shipments to buyers, collected the purchase price and remitted it to the taxpayer in Washington, where it accounted to the shippers.

The Washington Supreme Court sustained the Business and Occupation Tax as applied to the taxpayer's gross compensation on all fruit shipped from Washington. On appeal this Court reversed, and through Mr. Justice Stone, stated, 305 U.S. 434, 438:

> "While appellant is engaged in business within the state, and the state courts have sustained the tax as laid on its activities there, the interstate commerce service which it renders and for which the taxed compensation is paid is not wholly performed within the state. A substantial part of it is outside the state where sales are negotiated and written contracts of sale are executed, and where deliveries

and collections are made. Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit transported from Washington to purchasers elsewhere; so that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both within and without the state and burdens the commerce, in direct proportion to its volume."

The rationale for prohibiting the application of an unapportioned tax on gross receipts derived from interstate commerce is clearly stated, 305 U.S. 434, 439-40:

"Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed. *Adams Manufacturing Co. v. Storen, supra*, 310, 311; *cf. Fargo v. Michigan*, 121 U.S. 230; *Philadelphia & Southern S.S. Co. v. Pennsylvania*, 122 U.S. 326; *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U.S. 217, 225, 227; *Meyer v. Wells, Fargo & Co.*, 223 U.S. 298; *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292; *Fisher's Blend Station v. State Tax Commission*, 297 U.S. 650; see *Western Live Stock v. Bureau of Revenue, supra*, 260. Such a multiplication of state taxes, each measured by the volume of the commerce, would reestablish the barriers to interstate trade which it was the object of the commerce clause to remove. Unlawfulness of the burden depends upon its nature, measured

> in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden."

Although the tax was there applied to outshipments, the quoted language and reasoning are equally apropos of inshipments, and have been applied in such cases, e.g., *West Point Wholesale Grocery Co. v. City of Opelika*, 354 U.S. 390, in which a flat amount tax was invalidated as applied to inshipments with in-state activities very much more extensive than here.

C. The tax is invalid because the interstate commerce involved is exposed to unapportioned multiple burdens.

The last quotation from *Gwin, White & Prince, supra*, leads us to the third reason why the Washington tax may not, consistent with the Commerce Clause, be applied here: the interstate commerce involved is exposed to repeated exactions of the same nature from other states—the "multiple burdens" test. Measured against this standard, the tax is invalid. The Washington Supreme Court, in deciding that no "multiple burdens" were here imposed on interstate commerce, held that the imposition of gross receipts taxes elsewhere on the privilege of manufacturing are irrelevant to this point (R. 452-453). The risk of multiple burdens remains, however, since the same gross receipts may serve as the measure of both taxes. It is no answer to say, as did the Court below, that the taxes are levied on different privileges exercised in different states (R. 453).

But more important is that Court's failure to discuss the obvious multiple burden involved if other states impose similar taxes on the privilege of engaging in the business activities of *wholesale selling*. If the rationale of the de-

cision below is sustained, an identical tax could be levied, without apportionment, on the same gross receipts from this wholesale selling by every state in which any activity connected with such sales might occur. Other states, including Oregon, California, Michigan and Missouri, had contacts far more substantial than Washington with the taxed transactions (R. 14, 17-18, 47-48, 56-57).

Furthermore, this tax was imposed on interstate selling activities and not on any activity of General Motors "realistically separable" from such interstate commerce and measured by related interstate sales (R. 450-451). It is settled that a state may not fragmentize an interstate transaction into "local incidents" and measure a tax on such incidents by the unapportioned gross proceeds of the whole business. This Court dealt with that same question in *Nippert v. City of Richmond*, 327 U.S. 416, which struck down a flat amount municipal privilege tax as applied to the solicitation of interstate sales, saying at p. 423:

> "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a State could not be segregated by an act of mental gymnastics and made the fulcrum of the tax."
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> • • • • •
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> "This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the com-

> merce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and even substantial connections, in an economic sense, have been held inadequate to support the local tax."

The "incidents" found taxable here are far less substantial than other elements of the sale itself (without reaching back to the underlying manufacturing) which occur elsewhere, as the execution of "Dealer Selling Agreements" and the receipt and processing of orders at the zone offices in Oregon, and the acceptance of orders, receipt of payment and delivery at the factories in California and elsewhere (R. 14, 17-18, 47-48, 54, 56-57). If the minimal elements in Washington are taxable, so are the larger elements in Oregon and again in California. This is the very type of fragmentation of an interstate transaction with exposure to multiple *unapportioned* exactions which the Commerce Clause was designed to prevent.

The Washington Supreme Court simply misses the point when it states that the tax imposes no multiple burden because the taxable incident is "selling," not "manufacturing" (R. 451-453). Its decision exposes the same gross receipts to a similar tax in every state in which some part of the sales transaction happens to occur. Moreover, its opinion fails even to mention, although strenously urged below, the first two Commerce Clause grounds which invalidate the tax as applied—*viz.*, the tax is imposed on the *privilege* of engaging in interstate business (pp. 34-39, *supra*) and is imposed directly on the *unapportioned gross receipts* therefrom (pp. 39-42, *supra*).

D. The tax is valid only when applied to a local business, realistically separable from interstate commerce.

An occupation privilege tax measured by unapportioned gross receipts may only be levied on a *local business*, realistically separable from the process of interstate commerce. Examples are manufacturing or publishing completed before interstate movement begins, *American Manufacturing Company v. City of St. Louis*, 250 U.S. 459 and *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250; or the operation of a local retail store after the interstate journey ends, *Norton Company v. Department of Revenue*, 340 U.S. 534. This is not a matter of mere "labels": substantial local activities, not part of the integral process of commerce across state lines, must be present before this type of tax may constitutionally be applied.

Norton Company v. Department of Revenue, 340 U.S. 534, is controlling here. The Norton Company operated at Chicago, Illinois, a branch office and warehouse from which it made local sales at retail. These sales were admittedly subject to the Illinois Occupation Tax "upon persons engaged in the business of selling tangible personal property at retail within this State" assessed on the gross receipts of such sales, Ill. Rev. Stat., 1949, c. 120, §441. Norton also made sales to Illinois customers in which the orders were accepted at the home office in Worcester, Massachusetts, and filled by shipment f.o.b. Worcester either directly to the customer or via the Chicago office, which had also forwarded some of these orders to Worcester.

The Illinois Supreme Court held all of Norton's sales to Illinois customers taxable because of the presence of the local office and warehouse. This Court reversed as to trans-

actions which had no connection with the local outlet, except the services of engineers working out of it, and declined to reverse as to transactions which utilized the local outlet in some more substantial way by either receiving the orders or distributing the goods because such transactions were not satisfactorily dissociated from the admittedly taxable business of the local outlet. This Court said, 340 U.S. 534, 538, 539:

> "This corporation has so mingled taxable business with that which it contends is not taxable that it requires administrative and judicial judgment to separate the two. We conclude that, in the light of all the evidence, the judgment attributing to the Chicago branch income from all sales that utilized it either in receiving the orders or distributing the goods was within the realm of permissible judgment."
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> * * * * *
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> "The only items that are so clearly interstate in character that the State could not reasonably attribute their proceeds to the local business are orders sent directly to Worcester by the customer and shipped directly to the customer from Worcester. Income from those we think was not subject to this tax."

Thus, the only actual holding of *Norton* is that transactions which are not mixed up with a local taxable business cannot be subjected to this type of tax. That is the holding which controls here; however, the Washington Supreme Court misconstrues that holding to require General Motors to dissociate its interstate activities in Washington from its interstate sales to local retail dealers (R. 450).

All that *Norton* requires is that the taxpayer segregate his interstate business and transactions from any local taxable business: "Although the concern does not, by engaging

in business within the state, lose its right to do interstate business with tax immunity, *Cooney v. Mountain States Telegraph Co.*, 294 U.S. 384, it cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business." *Norton Company v. Department of Revenue*, 340 U.S. 534, 539. The taxability of each transaction depends upon its own facts.

Ever since the *Norton* decision, it has been understood that an interstate seller had to have some local office or store conducting a separate intrastate business participating in its interstate sales before the seller could constitutionally become subject to this type of transaction or gross receipts tax on such sales. A local office, sufficiently substantial to be a separable and taxable local business, is the *sine qua non* for this type of tax. No General Motors office or other place of business in Washington participated in the transactions of the first class involved herein. The trial court found that every step from receipt and acceptance of the order to delivery of product and receipt of payment occurred at a General Motors office, warehouse or factory outside the State (R. 54).

The Washington court seriously misread this Court's opinion in *Norton*. The Norton Company was operating an admittedly taxable local store. The transactions as to which this Court permitted the Illinois court's judgment of taxability to stand were all channeled in one way or another through that store. This Court said, at 340 U.S. 534, 537:

> "But when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some Illinois sales only by showing that particular transactions are dissociated from the local business and interstate in nature."

The burden of dissociation which Norton failed to carry was to dissociate the interstate business which passed through the store from the intrastate business of the store. The Washington court seemed to understand that at the time, as shown by its opinion in *B. F. Goodrich Co. v. State of Washington*, 38 Wash. 2d 663, 231 P. 2d 325, 330, wherein it said, analyzing the then brand-new *Norton* decision:

> "It [this Court in *Norton*] agreed that, where a corporation has gone into a state to do local business by state permission, and has set up an office which performs service helpful to its competition for local trade, it may be taxed like any other vendor for sales made in connection with that business. But this, the court held, does not prevent its being tax-free with respect to sales separate and distinct from its local business; though the burden is on the taxpayer to show this dissociation, where it is demonstrated, the sales involved are interstate commerce, and entitled to the same immunity from state taxation as if the corporation had never established an office within the borders of the state."

In the interim, that correct understanding has been lost and replaced by confusion. In its opinion herein, the Washington court says (R. 450):

> "According to the rule of the *Norton* case, *supra*, reiterated by this court in the *Goodrich* case, *supra*, where extensive business activity occurs within a state, taxation can only be avoided upon a showing that the activities are disassociated from the sales in question. Therefore, it is incumbent upon General Motors to make a showing of disassociation or, at a minimum, some degree of disassociation in order to remove from taxation that portion of sales not attributable to that activity. This has not been done."

The "activity" referred to is the promotional activity of the traveling representatives who called on the dealers in the state. Such activities of course cannot be dissociated from the sales to those dealers; but the sales were in interstate commerce exclusively. The activities were fully and completely dissociated from all other, unrelated, taxable intrastate commerce which General Motors was carrying on in the state. Thus, the trial court found (R. 55-56):

> "XXIV. With respect to the transactions in dispute, plaintiff at no time localized itself in Washington through an office, outlet or other place of business owned or leased by plaintiff, with the exception of the relation of Chevrolet's so-called 'Branch Office' to certain sales of that division. The transactions included in the assessment base were made without any participation or assistance whatsoever from any office, outlet or other place of business owned or leased by plaintiff in this state (with the exception of the relation of Chevrolet's so-called 'Branch Office' to certain sales of that division).
>
> "XXV. Plaintiff's Chevrolet, Pontiac, Oldsmobile and General Motors Parts Divisions operated substantially independently of each other and of other divisions and subsidiaries. The transactions of each division are in no way related to the transactions of any other division, and the transactions of the Portland warehouse of the General Motors Parts Division were in no way related to the transactions of the Seattle warehouse of that division."

That is the "dissociation" which *Norton* requires: segregation of interstate commerce from intrastate commerce. If it were necessary to show complete dissociation of instate activity from interstate sales, *Spector, Cheney, Dilworth, Alpha Portland Cement, Nippert, West Point,* and *Memphis Steam Laundry* would all have been decided differently. There was no tax in any of those cases because

the in-state activity, more extensive than here, was, as here, all part of the interstate transactions themselves.

The latest and most authoritative textbook on the subject of state taxation of multistate business, Beaman's "Paying Taxes to Other States",[13] contains, pages 12-13 through 12-17, a penetrating analysis of the *Norton* case and continues with a description of the commendable manner in which Illinois authorities, after that decision, sought by regulation to comply with all the pertinent holdings of this Court. The author says, at pp. 12-16:

> "The key to the *Norton* case, as interpreted by the regulation, is this: the Norton Company's intrastate business, which was concededly taxable, constituted a 'vortex' which attracted other business that was interstate in nature; therefore while the interstate business could not be taxed itself, the tax on the local business could be increased to reflect in its measure the interstate business it secured for the taxpayer. The extent of this 'tainting' of interstate sales was limited by the *Norton* majority to business channeled through the place of business at which the local business was being conducted; thus interstate business not so channeled was not deemed to increase the tax on the local business."

At p. 12-15:

> "The regulation[14] treats in separate paragraphs:
>
> 1. sales made by or through an Illinois place of business at which the seller sometimes makes intrastate retail sales;

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[13] Walter H. Beaman, "Paying Taxes to Other States", The Ronald Press Company, New York, 1963; Library of Congress #63-9292. The work was begun by Professor Mortimer M. Caplin and completed by Mr. Beaman after Professor Caplin was appointed Commissioner of Internal Revenue.

[14] Illinois Retailers' Occupation Tax Regulations, Article 5; App. E, pp. 12a-16a, *infra*.

2. sales made by or through an Illinois place of business at which the seller makes no intrastate retail sales, and

3. sales made by or through a place of business outside Illinois.

The rules laid down in these paragraphs are a melding of the *Norton*,[15] *Alpha Portland Cement*,[16] *Dilworth*,[17] *Nippert*,[18] and *Wiloil*[19] cases.

"Where the in-state office accepts an order so as to create a contract to sell, the sale is treated as taxable under the *Wiloil* doctrine. Where the order is received in the state, forwarded out-of-state for acceptance and filling, and the subsequent delivery to the purchaser is made through the local office, the sale is treated as taxable under *Norton*. If the sale is the result of an order sent by a customer to the seller's out-of-state office, and if the order is accepted at, and filled by shipment from; the out-of-state location, no tax is due, even though the order may be the product of itinerant solicitation in the state by solicitors coming from outside. This follows the *Nippert* and *Dilworth* cases. If the order is received in the state, forwarded out-of-state for acceptance, and filled by shipment from out-of-state stocks directly to the Illinois purchaser, the regulation directs this test: the sale will be taxable if the Illinois place of business receiving the order also makes intrastate sales (i.e., either concludes contracts to sell, or makes deliveries from Illinois stocks to Illinois customers), but would be non-taxable if the Illinois place of business does not make intra-

[15] *Norton Co. v. Department of Revenue*, 340 U.S. 534.

[16] *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203.

[17] *McLeod v. Dilworth*, 322 U.S. 327.

[18] *Nippert v. Richmond*, 327 U.S. 416.

[19] *Wiloil Corporation v. Pennsylvania*, 294 U.S. 169.

state sales. The first part of this test is based on *Norton;* the second on *Alpha Portland* and *Cheney Bros."* [20]

At p. 12-16:

> "The Illinois regulation also made clear that the rule of the *Nippert* case was to be respected. It specified that 'promotional activities' engaged in by an Illinois place of business would have no taxable effect, and it defined the term as follows:
>
> 'The term "promotional activities," as used in this regulation, shall mean and include any activities employed by salesmen or representatives in stimulating sales, including general correspondence; the distribution of catalogs or other similar sales literature; radio, newspaper, magazine and and other similar general advertising; good will calls; the interviewing of prospective customers; the solicitation of sales, and the like, but shall not include the receiving of orders, the making of contracts nor the making of complete and unconditional offers to sell to specific customers who accept such offers without modification so as to create contracts. * * *" [21]

After pointing out the importance to business of knowing beforehand what its gross receipts tax liability will be, and commending Illinois for its efforts in that direction, Mr. Beaman contrasts the Washington situation. At p. 12-17:

> "The *Norton* case was decided on February 26, 1951. Shortly thereafter, on May 15, 1951, the Supreme Court of the State of Washington handed down an opinion on issues partially controlled by the *Norton* case. The case was *B. F. Goodrich Co.*

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[20] *Cheney Bros. Co. v. Massachusetts*, 246 U.S. 147.

[21] P. 16a, *infra*.

v. Washington.[22] Obviously out of sympathy with the result in *Norton* insofar as it limited the state taxing power, the court applied the case as sparingly as possible. Instead of reading the opinion as resting on the proposition that the carrying on of an intrastate business was the taxable event, and that the taxpayer's interstate business was taxable only to the extent that it could not be separated from the intrastate business, the court declared that the *Norton* case permitted a state to impose its gross income tax on all interstate commerce except that with which 'a local outlet had nothing to do.'"

"This case set the tone of subsequent judicial rulings in the State of Washington with respect to Commerce Clause matters . . ."

In *Goodrich*, the Washington court held taxable every transaction that had any contact, however tenuous, with an in-state office, and held nontaxable transactions which were solicited in the state but had no contact with a local office. How far the "tone" of that decision has been deepened is apparent from that court's holding in this case that interstate sales are taxable notwithstanding the complete lack of contact with any local office and the absence of even local solicitation, upon the basis of purely promotional activities and advertising. The trial court had found nontaxable the transactions of the first class herein (no contact with any local office), but held the second class taxable (very slight contact with a local office doing no intrastate business), relying for both holdings on *Goodrich* (R. 21-22).

We believe that the Illinois regulations are a good synthesis of the decisions of this Court pertinent to the application of gross receipts taxes to in-shipments. Even though

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[22] 231 P.2d 325, cert. den. 342 U.S. 876.

it is quite apparent that Illinois was not trying to enlarge the interstate commerce immunity beyond what was absolutely necessary, it is clear that neither class of transactions herein would be taxed by Illinois. In contrast, the Washington court, far from attempting to apply the spirit of this Court's rulings, stretched them as far as possible in *Goodrich* and ignored them altogether here.

E. The added factor in the transactions of the second class does not make them taxable.

The transactions of the second class were handled in the same manner except that a Chevrolet "branch office" in Seattle, consisting of one man and his secretary, expedited the delivery of vehicles to Chevrolet dealers in a portion of the State and assisted them in other ways (R. 58-59). These activities, like those of the market agent in *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 437 were "in aid of the shipment and sale of merchandise in that (interstate and foreign) commerce." As such, the Chevrolet branch office rendered a service which was a part of the interstate movement of goods. Its activity is an inseparable part of that commerce and, though taxable on its net income properly apportioned, *Northwestern States Portland Cement Co. v. Minnesota—Williams v. Stockham Valves & Fittings, Inc.*, 358 U.S. 450, is immune from an unapportioned tax on the gross receipts of such commerce, *Norton Company v. Department of Revenue*, 340 U.S. 534.

This Court's *per curiam* affirmance, 352 U.S. 806, of the decision of the Washington Supreme Court in *Field Enterprises, Inc. v. State of Washington*, 47 Wash. 2d 852, 289

P. 2d 1010, that the taxpayer there was properly assessed with this tax, does not sustain the tax here assessed. Field Enterprises operated an office in Washington, to which was attached a large corps of salesmen who solicited and took orders, received down payments, and, together with other personnel of the office, performed other services in Washington. General Motors has somewhat similar arrangements in Washington, although the number of its personnel and its local activities are only a small fraction of what Field Enterprises' were in relation to the measure of tax, and voluntarily has always paid the tax thereon. *Those arrangements and activities have no relation whatever to the activities, transactions and tax involved in this Appeal.*

F. Important Distinctions.

Certain distinctions which are pertinent to both interstate commerce and due process considerations need to be kept in mind. We mention them at this point and will not repeat them in discussing the due process question.

There are controlling constitutional differences among intrastate, interstate and extrastate businesses which have been mentioned above.

There are different rules governing different types of taxes, so that it is necessary to observe, with respect to each precedent decision, the type of tax there involved. Circumstances which will permit an apportioned net income tax or impose responsibility for collecting a use tax will not necessarily justify a franchise tax measured by unapportioned gross receipts.

The phrase "doing business" is used in three different senses for three different purposes. Very minor contacts are "doing business" sufficiently to support jurisdiction for service of process. More is needed to require qualification of a foreign corporation to "do business". Much more is required to support local taxation as a local business.

SECOND QUESTION—INTERSTATE COMMERCE

The second question is the narrow one whether the Washington statute unconstitutionally discriminates against interstate commerce by arranging that an intrastate manufacturer-seller shall pay only one tax while an interstate manufacturer-seller may be required to pay two.

In separate subsections, the Washington Business and Occupation Tax statute levies taxes at the same rate on the privilege of manufacturing, RCW 82.04.240 (p. 2a, *infra*), and the privilege of selling at wholesale, RCW 82.04.270 (p. 2a, *infra*). It then exempts from the tax upon manufacturing any person who is taxable as a seller as to the same goods, RCW 82.04.440 (pp. 3a-4a, *infra*). The statute thus insures that any Washington manufacturer who sells to a Washington customer shall pay only one tax; and it seeks to lay the same tax burden upon a Washington manufacturer who makes a sale to an out-state customer and upon an out-state manufacturer who sells to an in-state customer.

The statute presents an appearance of fairness—everyone seems to pay only one tax. The fact is, however, that everyone pays only one tax to *Washington*. An out-of-state manufacturer who pays to his state a tax on the privilege of manufacturing is then met by a demand from Washington for a tax upon the privilege of making sales to customers in Washington. This case involves actual double taxation, not borne by a local competing manufacturer, for as to those vehicles manufactured in St. Louis, Missouri, and sold to Washington customers, St. Louis levies a tax on the privilege of manufacturing which is indistinguishable from Washington's tax on manufacturing. App. B, pp. 5a-6a, *infra*. Both manufacturing taxes have been held valid: *American Manufacturing Company v. City of St. Louis*,

250 U.S. 459, and *Crown Zellerbach Corporation v. State of Washington*, 45 Wn. 2d 749, 278 P. 2d 305.

This Court has often invalidated local gross receipts taxes upon a showing of risk that the state of the buyer and the state of the seller might, through different taxing techniques, impose upon interstate commerce multiple tax burdens not borne by intrastate commerce: *Adams Manufacturing Co. v. Storen*, 304 U.S. 307; *Gwin, White & Prince Inc. v. Henneford*, 305 U.S. 434, 439; *Freeman v. Hewit*, 329 U.S. 249. This unvarying constitutional principle that a state may not so discriminate against interstate commerce was reaffirmed in *Northwestern States Portland Cement Co. v. Minnesota—Williams v. Stockham Valves & Fittings, Inc.*, 358 U.S. 450, 458:

> "Nor may a State impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, *Memphis Steam Laundry v. Stone*, 342 U.S. 389 (1952); *Nippert v. Richmond*, 327 U.S. 416 (1946); or by subjecting interstate commerce to the burden of 'multiple taxation,' *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954); *Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938)."

Here we have more than a possible, fortuitous multiplication of burdens. We have actual double taxation through a taxing scheme carefully calculated to discriminate against interstate commerce by providing a direct commercial advantage to local business. Such discrimination is forbidden.

In *Columbia Steel Co. v. State of Washington*, 30 Wn. 2d 658, 192 P.2d 976 and *Weyerhaeuser Sales Co. v. Tax Commission*, 30 Wn. 2d 947, 192 P.2d 979, the Supreme Court of Washington itself held that an earlier version of this statute was invalid on Commerce Clause grounds because it exempted from the *wholesalers'* tax those persons

who had paid the tax as *manufacturers*. We disagree with that court's holding in *B. F. Goodrich Co. v. State of Washington*, 38 Wn. 2d 663, 231 P.2d 325, and in this case (R. 452-453), that the Legislature has cured the infirmity by merely reversing the words so as to exempt from the *manufacturers'* tax those persons who have paid the tax as *wholesalers*.[23] "Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern." *Nippert v. City of Richmond*, 327 U.S. 416, 431. *Cf. Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, in which just such a practical working out of a sales and use tax statute with certain exemptions was found to discriminate unconstitutionally against interstate commerce.

The Washington court makes the same error in this case that the Louisiana court made in *Halliburton:* it makes the wrong comparison. In *Halliburton*, the Louisiana court compared the use tax which Halliburton was asked to pay on equipment of its own manufacture (at full value, including labor cost) with the sales tax which a local purchaser would pay on similarly completed machinery, and found equality. As the Chief Justice observed when this Court reversed, at 373 U.S. 64, 71: "* * * the proper comparison on the basis of this record is between the in-state and out-of-state manufacturer-users." It then appeared that Halliburton was being discriminated against, because a person who manufactured such equipment within the state would be taxed on only the cost of materials.

Similarly, the Washington court compares only the selling activity of an out-of-state manufacturer with the selling activity of an in-state manufacturer (R. 452):

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[23] RCW 82.04.440, former version, p. 3a, *infra;* current version, pp. 3a-4a, *infra.*

> "The tax in question is applicable to all who engage, within the state, in the business of making sales at wholesale. It is only that local activity which is being subjected to taxation. And the tax is imposed equally upon all who participate in the same activity within the state."

It refuses to compare the total activity of the out-of-state manufacturer with the total activity of the in-state manufacturer (R. 452):

> " 'And if Washington's statute exempts local manufacturers from paying their tax as manufacturers, providing they * * * pay it as sellers, that * * * can be of no concern to one who manufactures out of the state.' "

It *is* of concern to General Motors who manufactures out of the state because it results in double taxation not borne by the in-state manufacurer. If Washington imposed separate taxes upon manufacturing and upon selling, as it does, and required a local manufacturer-seller to pay both taxes, as it does not, General Motors would have no complaint upon this argument. It would pay its manufacturing tax to other states and its selling tax to Washington, and its in-state competitor would pay both taxes to Washington.

Such discrimination against interstate commerce is not justified by the Washington Supreme Court's observation (R. 452):

> "Those involved in interstate commerce are not forced to bear any burden not borne by those exclusively engaged in intrastate commerce, so it cannot be said that the tax is discriminatory."

Even if there were no discrimination, and in this case there assuredly is, that argument has not been acceptable to this

Court. The complete answer is found in *Freeman v. Hewit*, 329 U.S. 249, 254:

> "It [a state] cannot justify what amounts to a levy upon the very process of commerce across States lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce."

It is no answer to say, as the Washington court does, that what other states do is of no concern in this case. The vice is in Washington's own statute. If all states had exactly the same tax structure that Washington has, every manufacturer would pay two taxes on the proceeds of goods manufactured in one state and sold in another, while goods manufactured in the state of sale would pay only one. It would be difficult to imagine a better scheme for imposing interstate tariffs.

The Washington court's position is not aided by its assertion that the wholesale tax is based on an activity separate and distinct from manufacturing and is imposed equally upon all who participate in that activity (R. 453). The point is that the local manufacturer-wholesaler pays one tax, while his out-of-state counterpart is exposed to the risk of a double tax on the same integrated activity of manufacturing-selling. Here we have actual double taxation because vehicles manufactured in St. Louis and subject to its gross receipts tax on the privilege of manufacturing were included in the gross receipts tax base upon which Washington demands its wholesaling tax (R. 14).

THIRD QUESTION—DUE PROCESS

The third question is whether the Washington tax as here applied is an unconstitutional denial of due process either because its reaches transactions outside Washington's territorial jurisdiction or because its measure bears no reasonable relation to activities within the state.

The decision below sustains a privilege tax measured by the entire gross receipts of an out-of-state manufacturer from wholesale sales of goods manufactured and sold out-of-state but shipped to retail dealers within the state when that manufacturer's in-state business activities related to such dealers consisted only of promotional and service efforts by traveling representatives in furtherance of the out-of-state manufacture, sale and delivery. From the time of receipt and acceptance of an order to consummation by delivery of product and receipt of payment, every step on General Motors' part in each of the classes of transactions in dispute is performed at an office, warehouse or factory outside the state (R. 46-60).

The opinion of the Washington Supreme Court lays aside these facts by saying (R. 450):

> "Although the mechanical aspects of the wholesale sales of General Motors to retail dealers occur outside of the state, the substance of each transactions occurs in Washington *where the customer is located and where the demand for the manufactured products exists,* in very large degree, as a result of General Motors promotional activities." (Emphasis added.)

The substance of the holding of the Supreme Court of Washington is that an unapportioned tax measured by gross receipts may be exacted for the privilege of having

customers in the state, provided only that there are within the state—first, the customer; second, some minimal presence by the taxpayer within the state, including national advertising developed and placed without the state (R. 450). On the contrary, "• • • due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344-45.

The wholesale sales upon which the Court below sustained the tax were not made in Washington but elsewhere. Levying the tax on such sales is an unwarranted projection of state power beyond its borders and a taking of property without due process of law. Such taxation was struck down in *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327 in which this Court held that Arkansas could not impose a sales tax upon sales of goods in Tennessee for delivery by common carrier into Arkansas, following solicitation of orders by traveling salesman in Arkansas. The Court said, 322 U.S. 327, 330:

> "• • • in this case the Tennessee seller was through selling in Tennessee. We would have to destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction."

All that has been done here within the jurisdiction is (1) to beam in national advertising placed without the jurisdiction; (2) to watch and advise the retail dealers (customers) in the conduct of their business; and (3) to have customers within the jurisdiction. It is this last point on which the Court below founders. It equates the having of customers with an obligation to the state. An obligation for

what? The protection and benefits for which the state is entitled to be reimbursed all go to the customers (who pay for them in their own taxes). No protection or benefits are given to General Motors merely by reason of the fact that retail dealers, or in turn their retail customers, resident in the jurisdiction provide a "market" for its products.

It is a violation of due process for a state to tax activities and transactions beyond its borders, or to impose a tax the measure of which does not bear a reasonable fiscal relationship to the protection and benefits conferred by the state on the intrastate activities which give rise to the tax. *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435.[24] This Court there stated, at page 444:

> "That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and bene-

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[24] Other courts have recognized that due process and equal protection considerations prevent the imposition of unapportioned gross receipts taxes upon activities which are conducted only in part within the taxing jurisdiction. The decision of the Supreme Court of California in *City of Los Angeles v. Belridge Oil Company*, 48 Cal. 2d 320, 309 P. 2d 417, is directly in conflict with the decision of the Washington Supreme Court in this case, and is particularly interesting in that the business there involved was confined entirely to California with no interstate aspects. It holds that, as a matter of due process and equal protection, Los Angeles may impose its gross receipts tax upon only that portion of receipts arising from selling activities carried on within and without the city as are fairly attributable to the portion of such activities carried on within the city. The Supreme Court of Illinois, which had been reversed in part by this Court in *Norton Company v. Department of Revenue*, 340 U.S. 534, later held in *Automatic Voting Machine Corp. v. Daley*, 409 Ill. 438, 100 N.E. 2d 591, that extensive sales promotion activities, the delivery of bids, the passage of title to the goods sold, the installation and servicing of the machines and the giving of instruction in their operation, all by non-resident employes temporarily in the state, did not constitute the business of making sales in the state. In New York City, the enabling act and the ordinance themselves provide for apportionment. *Gulf Oil Corp. v. Joseph*, 307 N.Y. 342, 121 N.E. 2d 360; *U. S. Steel Corp. v. Gerosa*, 7 N.Y. 2d 454, 166 N.E. 2d 489.

> fits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."

The J. C. Penney Co. satisfied this measure because it was engaging in substantial intrastate business to which the dividend income sought to be taxed was fairly attributable.

On the contrary, General Motors' business, insofar as these transactions are concerned, is carried on entirely through manufacturing and distribution activities in other states, with only incidental contacts within the State of Washington. It is arbitrary and unreasonable to require General Motors, whose primary business is the manufacture of motor vehicles from such basic materials as steel and cloth, to pay the same tax that would be payable if all such activity were in Washington. This is an entirely different situation from that illustrated by *International Shoe Co. v. State of Washington*, 326 U.S. 310. Although the principal issue in that case was whether the State of Washington had any jurisdiction at all over the taxpayer as for service of process, the Court went on to hold that the tax in that case was valid. It was an unemployment compensation tax measured by the wages of employes permanently in the state and who would look to that state for any unemployment benefits for which they might become eligible.

A tax otherwise violates due process if it is not properly apportioned to business done in the taxing jurisdiction. *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123. The North Carolina statute imposed a tax measured by apportioned net income, but the apportionment formula attributed 80 per cent of the taxpayer's income to North Carolina whereas it appeared that in fact no more than 17 per cent actually arose there. The result was unconstitutional. The

result here is much more aggravated. The tax applies to one hundred per cent of receipts, and while we have no precise measure of the amount attributable to in-state activities, it is obvious that it cannot be more than a tiny fraction of one per cent.

This Court has never held that an unapportioned gross receipts tax could be imposed for the privilege of doing business in a jurisdiction where there was no office participating in the business, and has frequently held to the contrary. *Norton Company v. Department of Revenue*, 340 U.S. 534. Until now, a local office, sufficiently substantial to be a "separable local business," has been the *sine qua non* for this type of tax.

The Washington Supreme Court has erred, not only in finding a "taxable incident," but in holding that, there being such an incident, the measure of the tax based upon that incident is constitutionally immaterial. This Court has held to the contrary, notably in *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, involving this very tax. In that case it said, at page 438:

> "While appellant is engaged in business within the state, and the state courts have sustained the tax as laid on its activities there, the interstate commerce service which it renders and for which the taxed compensation is paid is not wholly performed within the state. A substantial part of it is outside the state where sales are negotiated and written contracts of sale are executed, and where deliveries and collections are made. Both the compensation and the tax laid upon it are measured by the amount of the commerce—the number of boxes of fruit transported from Washington to purchasers elsewhere; *so that the tax, though nominally imposed upon appellant's activities in Washington, by the very method of its measurement reaches the entire interstate commerce service rendered both*

> *within and without the state and burdens the commerce in direct proportion to its volume.*" (Emphasis added.)

Although couched in interstate commerce terms, *Gwin, White & Prince* is eloquent in its denunciation of an improper measure in reasoning which is equally appropriate to due process.

As Professor Hartman points out, "territorial limitations on the power of a State to tax have been consistently recognized before as well as since the Fourteenth Amendment."[25] Although since adoption of that Amendment state attempts to tax extraterritorial values have been curbed as violations of its due process clause, the same result was consistently achieved earlier on the principle that the jurisdiction of any state is limited to persons, things, and events within its own boundaries.

As applied to taxation, the principle developed in the earlier cases was very well expounded by the unanimous Court in *New York, Lake Erie & Western Railroad Company v. Pennsylvania*, 153 U.S. 628, speaking through Mr. Justice John Marshall Harlan, at page 646:

> "No principle is better settled than that the power of a State, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction. *State Tax on Foreign-held Bonds*, 15 Wall. 300, 319; *Railroad Co. v. Jackson*, 7 Wall. 262; *St. Louis v. Ferry Co.*, 11 Wall. 423; *Delaware Railroad Tax*, 18 Wall. 206."[26]

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[25] Paul J. Hartman: "State Taxation of Interstate Commerce," Dennis & Co., Inc. (1953), Library of Congress, #53-11622, at page 15.

[26] To the same effect, *Hays v. The Pacific Mail Steamship Co.*, 17 How. 596, in 1855.

The question there was whether a New York corporation doing business in Pennsylvania could be compelled to withhold a Pennsylvania tax validly imposed upon Pennsylvania citizens from interest payments made in New York. Conceding that the state could impose such a requirement upon a domestic corporation under some circumstances, the Court said, at page 646:

> "—it does not follow that the State may impose upon foreign corporations, because of their doing business in that State * * *, any duty in respect to the mode in which they shall perform their obligations in other States.
>
> "The New York, Lake Erie and Western Railroad Company is not subject to regulations established by Pennsylvania in respect to the mode in which it shall transact its business in the State of New York."

The foregoing quotation points up the principle that a tax on transactions—and that is the substance of the tax here—may be imposed only by an authority which has jurisdiction over the *transaction*, as distinguished from the *person* of the taxpayer. Near the other end of the scale is *International Shoe Co. v. State of Washington*, 326 U.S. 310, in which the tax was validly imposed because, although the state had only the most tenuous relation to the taxpayer, the *transactions* taxed—the performance of an employment contract—were wholly within its geographical domain.

The real reason for the assertion of the tax against General Motors is the presence of customers in the state and not the quantity or quality of General Motors' activities within the state. Under such circumstances, it is clear that the tax asserted bears no reasonable "relation to protection, opportunities and benefits given by the state" to Gen-

eral Motors. In fact, the privileges sought to be taxed are granted and protected by the United States Constitution, not by the State of Washington, and are exercised almost entitrely in other states. The state has not "given anything for which it can ask return".

CONCLUSION

Appellees State of Washington, et al., have assessed against appellant General Motors Corporation a "business and occupation tax" measured by gross receipts purportedly "for the act or privilege of", RCW 82.04.220, "engaging within this state in the business of making sales at wholesale", RCW 82.04.270. The taxed receipts were from the manufacture and sale of goods wholly without the state, the related in-state activities being merely promotional. There was no related intrastate business. The first class of transactions was in no way related to any in-state office. The activities of the in-state office related to the second class of transactions were principally expediting interstate shipments and an integral part of the interstate commerce.

The assessments are invalid because they impose a franchise tax for the privilege of engaging in pure interstate commerce. Such taxes are "invalid without regard to measure or amount."—*Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 217; *Spector Motor Service Inc. v. O'Connor*, 340 U.S. 602; *Northwestern States Portland Cement Co. v. Minnesota—Williams v. Stockham Valves & Fittings, Inc.*, 358 U.S. 450, 458.

The assessments are invalid because, if the minimal activities related to the purportedly taxed business of wholesaling which are carried on in Washington can be subjected by Washington to a tax measured by unapportioned

gross receipts, so can the much greater portions of the same business transacted in other states, thus exposing the commerce to multiple burdens merely because it is interstate commerce. *Nippert v. City of Richmond*, 327 U.S. 416. There is here no separable local business. *Norton Company v. Department of Revenue*, 340 U.S. 534.

The assessments are invalid because, as to some of the transactions there is actual double taxation, and as to the balance the possibility of double taxation, by reason of the separate taxation of manufacturing and of wholesaling and the exemption from one of the taxes of a local taxpayer who pays the other. *Freeman v. Hewit*, 329 U.S. 249; *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64.

The assessments are invalid because they reach transactions wholly without the state with only minimal in-state contacts. *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434. This violates the due process clause of the Fourteenth Amendment, *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, and wholly apart from that Amendment is an unconstitutional extension of state power beyond its territorial limits, *New York, Lake Erie & Western Railroad Company v. Pennsylvania*, 153 U.S. 628.

The assessments are invalid because, being measured by unapportioned gross receipts from activities carried on almost entirely without the state, they are out of all reasonable proportion to activities within the state and to the protection and benefits conferred on them. *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123; *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435.

As the opinion shows, the judgment below rests entirely upon the economically and constitutionally untenable theory

that taxes should be paid to the "market state" for the privilege of having customers therein. If allowed to stand it would do great damage to established relationships, create unsuspected liabilities for past transactions in Washington and other states, in some cases extending far back because of lack or inapplicability of statutes of limitation, and constitute a new barrier to interstate commerce.

The Judgment of the Supreme Court of Washington should be reversed and remanded with directions to refund the taxes and interest paid, with interest, and to enjoin further attempts to assess and collect this tax with respect to Appellant's similar transactions, past and future.

Respectfully submitted,

ALOYSIUS F. POWER,
DONALD K. BARNES,
THOMAS J. HUGHES,
3044 West Grand Boulevard,
Detroit, Michigan, 48202;

DEWITT WILLIAMS,
1440 Washington Building,
Seattle, Washington, 98101,
Attorneys for Appellant.

WILLIAMS, LANZA, KASTNER & GIBBS,
Seattle, Washington,
Of Counsel.

APPENDIX A

STATUTES

CHAPTER 82.04 OF THE REVISED CODE OF WASHINGTON[1]

82.04.040 *"Sale", "casual or isolated sale."* (c) The word "sale" means any transfer of the ownership of, title to, or possession of property for a valuable consideration • • •. (Laws of 1945, Chap. 249, Sec. 1, P. 731; Laws of 1949, Chap. 228, Sec. 2, P. 817; RCW 82.04.040, Vol. 8, P. 3)

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82.04.060 *"Sale at wholesale," "wholesale sale."* (e) The term "sale at wholesale" or "wholesale sale" means any sale of tangible personal property and any sale of or charge made for labor and services rendered in respect to real or personal property, which is not a sale at retail; (Laws of 1945, Chap. 249, Sec. 1, P. 733; Laws of 1949, Chap. 228, Sec. 2, P. 819; RCW 82.04.060, Vol. 8, P. 5)

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82.04.070 *"Gross proceeds of sales."* The term "gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property and for services rendered without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest, discount paid, delivery costs, taxes, or any other expense whatsoever paid or accrued and without any de-

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[1] The tax periods involved in this action are from January 1, 1949 through June 30, 1953. The text of the statutes is that in effect on January 1, 1949, except that RCW 82.04.295, which increased the tax rate, was enacted in 1951. Subsequent statutory amendments through June 30, 1953 and the Revised Code of Washington (RCW) references are cited following the text. None of these amendments changed the meaning or substance of the statutes insofar as pertinent to the issues involved in this Appeal except for the 1950 amendment to RCW 82.04.440 which is set forth in full.

duction on account of losses; (Laws of 1945, Chap. 249 Sec. 1, P. 733; Laws of 1949, Chap. 228, Sec 2, P. 819; RCW 82.04.070, Vol. 8, P. 6)

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82.04.220 *Business and occupation tax imposed.* Section 4. From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows: (Laws of 1943, Chap. 156, Sec. 1, P. 487; Laws of 1949, Chap. 228, Sec. 1, P. 814; Laws of 1950, Extraordinary Session, Chap. 5, Sec. 1, P. 7; RCW 82.04.220, Vol. 8, P. 9)

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82.04.240 *Tax on manufacturers.* (b) Upon every person engaging within this state in business as a manufacturer; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products manufactured, multiplied by the rate of one-quarter of one per cent;

The measure of the tax is the value of the products so manufactured regardless of the place of sale or the fact that deliveries may be made to points outside the state; (Laws of 1943, Chap. 156, Sec. 1, P. 487; Laws of 1949, Chap. 228, Sec. 1, P. 815; Laws of 1950, Extraordinary Session, Chap. 5, Sec. 1, P. 7; RCW 82.04.240, Vol. 8, P. 10)

82.04.270 *Tax on wholesalers.* (e) Upon every person except persons taxable under subsection (d) above[2] engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one per cent; (Laws of 1943, Chap. 156, Sec. 1, P. 488; Laws of 1949, Chap. 228, Sec. 1, P. 816; Laws of 1950, Extraordinary Session, Chap. 5, Sec. 1, P. 8; RCW 82.04.270, Vol. 8, P. 11)

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[2] This subsection deals with wholesalers of grain.

82.04.295 *Temporary surtax imposed.* From and after the first day of November, 1951, until the thirtieth day of April, 1953[3] there is levied and shall be collected from every person for the act or privilege of engaging in business activities, as a part of the tax imposed by this chapter and as a temporary increase thereof, a surtax in the amount of twenty percent of the tax payable under this chapter. (Laws of 1951, Second Extraordinary Session, Chap. 28, Sec. 1, P. 116; RCW 82.04.295, Vol. 8, P. 12)

• • • • •

82.04.440—prior to amendment in 1950. *Persons taxable on multiple activities.* Section 6. Every person engaging in activities which are within the purview of the provisions of two or more of paragraphs (a), (b), (c), (d), (e), (f), and (g) of section 4, shall be taxable under each paragraph applicable to the activities engaged in: Provided, however, That persons taxable under paragraphs (a) or (b) of said section shall not be taxable under paragraphs (c) or (e) of said section with respect to making sales at retail or wholesale of products extracted or manufactured within this state by such persons.[4] (Laws of 1943, Chap. 156, Sec. 3, P. 496; Laws of 1949, Chap. 228, Sec. 2-A, P. 823; Laws of 1950, Extraordinary Session, Chap. 5, Sec. 2, P. 9; Laws of 1951, Extraordinary Session, Chap. 9, Sec. 1, P. 12; RCW 82.04.440, Vol. 8, P. 17)

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82.04.440 *Persons taxable on multiple activities.* Section 6. Every person engaged in activities which are within the purview of the provisions of two or more of paragraphs (a), (b), (c), (d), (e), (f), and (g) of section 4,

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[3] Temporary surtax continuously extended, increased and made permanent at the rate of seventy-six per cent by Laws of 1961, Chap. 293, Sec. 2, P. 2361; RCW 82.04.296, Vol. 8, P. 12.

[4] Paragraph (a) imposed the tax on the business of "extracting" and paragraph (b) imposed the tax on the business of "manufacturing". Persons taxable as extractors or manufacturers were exempt under this section from the retailer's tax imposed by paragraph (c) and from the wholesaler's tax imposed by paragraph (e).

shall be taxable under each paragraph applicable to the activities engaged in: Provided, however, That persons taxable under paragraphs (c) or (e) of said section shall not be taxable under paragraphs (a), (b), or (d) (2) of said section with respect to extracting or manufacturing of the products so sold.[5] (Laws of 1950, Extraordinary Session, Chap. 5, Sec. 2, P. 9; Laws of 1951, Extraordinary Session, Chap. 9, Sec. 1, P. 12; RCW 82.04.440, Vol. 8, P. 17)

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82.04.500 *Tax part of operating overhead.* Section 14. It is not the purpose of this title that the taxes herein levied upon persons engaging in business shall be construed as taxes upon the purchasers or customers, but it is the intention that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons engaging in business. (Laws of 1935, Chap. 180, Sec. 14, P. 721; RCW 82.04.500, Vol. 8, P. 19)

[5] This amendment, effective August 1, 1950, merely reversed the words so that a person taxable as a wholesaler or retailer is now exempt from the manufacturer's and extractor's taxes with respect to such goods sold.

APPENDIX B

CHAPTER 13 OF THE REVISED CODE OF THE CITY OF ST. LOUIS, 1948

Sec. 31. *License required; fee; deductions; license not assignable.* Every manufacturer shall, before doing, or offering to do, business as such, procure from the license collector a license therefor, under the provisions of this article. The fee for such license shall be at the same rate as merchants are required to pay for a license. • • •. (Chap. 13, Art. VII, Sec. 31, Rev. Code of City of St. Louis, 1948, Vol. 1, p. 272)

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Sec. 32. *Comptroller to furnish blank licenses to license collector; form of license.* It shall be the duty of the comptroller to furnish the license collector with blank licenses, which license shall be charged to the license collector, and his receipt taken therefor.

This license shall be in the following form: No ... manufacturers' city license. The City of St. Louis: To all who shall see these presents, greeting: Know ye that .... have paid ....., license collector of the City of St. Louis, the sum of ..... dollars, being the license tax upon ....., as manufacturer; therefore, the said ..... is hereby authorized to manufacture the following articles, viz.: ..... except as otherwise provided by ordinance, at any one place of business within the city for the year ending on the first Monday of July, 19.., and to sell and dispose of such articles so manufactured at the same place, or any other one place in the city. In testimony whereof, I, ..., comptroller of the City of St. Louis, have hereunto set my hand this .. day of ....., 19.., ... comptroller. Attest: ....., register. Tax ....., license .....,

delivered this .. day of ....., 19.., ... license collector. (1936, §1389.) (Chap. 13, Art. VII, Sec. 32, Rev. Code of the City of St. Louis, 1948, Vol. 1, pp. 272-73)

* * * * * *

Sec. 51. *Amount of license fee; minimum fee.* The license fee to be paid every year by the merchant, (in addition to the ad valorem tax) shall be one dollar and twenty-five cents on each one thousand dollars or fractional part thereof, of sales made by such merchant; * * *. (Chap. 13, Art. VIII, Sec. 51, Rev. Code of the City of St. Louis, 1948, Vol. 1, p. 276).

APPENDIX C

PUBLIC LAW 86-272, SECTIONS 101-104, 73 STAT. 555 (15 U.S. CODE §§381-384)

Sec. 101. (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this Act, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) The provisions of subsection (a) shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to—

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

(c) For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

(d) For purposes of this section—

(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term "representative" does not include an independent contractor.

Sec. 102. (a) No State, or political subdivision thereof, shall have power to assess, after the date of the enactment of this Act, any net income tax which was imposed by such State or political subdivision, as the case may be, for any taxable year ending on or before such date, on the income derived within such State by any person from interstate commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by section 101.

(b) The provisions of subsection (a) shall not be construed—

(1) to invalidate the collection, on or before the date of the enactment of this Act, of any net income tax imposed for a taxable year ending on or before such date, or

(2) to prohibit the collection, after the date of the enactment of this Act, of any net income tax which was assessed on or before such date for a taxable year ending on or before such date.

Sec. 103. For purposes of this title, the term "net income tax" means any tax imposed on, or measured by, net income.

Sec. 104. If any provision of this title or the application of such provision to any person or circumstance is held invalid, the remainder of this title or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

APPENDIX D

UNITED STATES CONSTITUTION

Art. I, Sec. 8, clause 3:

"The Congress shall have Power—

* * * * *

"To regulate Commerce * * * among the several States * * *"

Fourteenth Amendment, Sec. 1:

"* * * nor shall any State deprive any person of * * * property, without due process of law; * * *"

APPENDIX E

SECTION III OF ARTICLE 5 OF THE ILLINOIS RETAILERS' OCCUPATION TAX REGULATIONS

III. SALES OF PROPERTY ORIGINATING IN OTHER STATES.—

1. *Preliminary Comments.* In all the examples set out hereinbelow, there are three basic facts which will not be restated in the examples in the interest of avoiding repetition, but which will be assumed to be present in each of the examples. These assumed facts are the following:

a. That the property which is involved is located outside Illinois at the time of its sale (or subsequently will be produced outside Illinois);

b. that the purchaser or his representative (not an independent carrier engaged in the busineess of transporting property for hire) first receives the physical possession of the property in Illinois, and

c. that the sale is at retail and is not made as a necessary and incidental part of a transaction in which the seller is engaged in a tax-exempt service occupation.

Each type of sale will be considered on its own facts. If the sale is made by or through an Illinois place of business at which the seller sometimes makes intrastate retail sales, refer to paragraph 2 below. If the sale is made by or through an Illinois place of business at which the seller does not make any intrastate retail sales, refer to paragraph 3 below. If the sale is made by or through the

seller's place of business outside Illinois, refer to paragraph 4 below.

2. Sales Made By or Through an Illinois Place of Business at Which the Seller Sometimes Makes Intrastate Retail Sales. The seller incurs retailers' occupation tax liability with respect to his receipts from a particular sale if the sale is made by or through an Illinois place of business at which the seller sometimes makes intrastate retail sales. This happens, for example, if such a place of business either

a. makes a complete and unconditional offer to sell, which is accepted without modification by the purchaser so as to create a contract, or

b. receives an offer or counteroffer to purchase (regardless of where the seller accepts such offer or counteroffer), or

c. accepts (i.e., approves so as to create a contract) an offer or counteroffer to purchase, or

d. makes final delivery of the property in Illinois to the purchaser. (The reference, immediately above, to the making of final delivery of the property in Illinois does not include the delivery of the property by the seller outside Illinois to an independent carrier for transportation directly to the purchaser.)

The sale is not made by or through such a place of business if it merely engages in promotional activities in connection with the sale.

3. Sales Made By or Through an Illinois Place of Business at Which the Seller Makes No Intrastate Retail Sales. The seller may incur retailers' occupation tax liability when the sale is made by or through an Illinois place of business at which he does not make any intrastate retail sales. This

is the case, for example, where such a place of business either

a. accepts the contract of sale for the seller, or

b. receives an offer or counteroffer to purchase, which, under authority granted by the seller, can be accepted for the seller by someone in Illinois so as to create a contract (whether such authority is exercised in a particular case or not), or

c. makes a complete unconditional offer to sell, which offer is accepted without modification by the purchaser so as to create a contract, or

d. receives an order subject to acceptance by the seller outside Illinois, but the seller transfers title to the property in Illinois to the purchaser, or the seller or his representative makes final delivery of the property in Illinois to the purchaser. (The reference, immediately above, to the making of final delivery of the property in Illinois does not include the delivery of the property by the seller outside Illinois to an independent carrier for transportation directly to the purchaser.)

The seller's maintenance, in Illinois, of a place of business at which the seller makes no intrastate retail sales does not make the seller taxable in a particular case merely because such place of business engages in promotional activities in Illinois and receives an order which is subject to acceptance outside Illinois by the seller.

4. Sales Made By or Through a Place of Business Outside Illinois. No retailers' occupation tax liability will be incurred in the following situations:

a. Where a representative of the seller who reports directly to an out-of-State place of business of the seller, and who is not connected in any way with any Illinois place of

business of the seller, receives, in Illinois, an order which is subject to acceptance by the seller outside Illinois;

b. where the seller, from a point outside Illinois, makes an offer directly to the purchaser who transmits his acceptance directly to the seller outside Illinois, or

c. where the purchaser sends an offer or counteroffer to purchase directly to the seller outside Illinois and the seller accepts the offer or counteroffer outside Illinois.

In these situations, it is immaterial where title to the property passes to the purchaser. It is also immaterial how or by whom delivery of the property is made, provided that final delivery is not made by or through an Illinois place of business at which the seller does some intrastate retail selling.

In the following situations, where the sale is made by or through an out-of-State place of business of the seller, retailers' occupation tax liability will, nevertheless, be incurred:

a. Where the seller or his authorized representative accepts an order in Illinois so as to create a contract, or

b. where the order is received in Illinois on behalf of the seller and someone in Illinois has authority to accept such order so as to create a contract (whether such authority is exercised in the particular case or not).

Even though the seller's out-of-State place of business is involved in the transaction in some way, paragraph 2 or paragraph 3 of this subdivision (rather than paragraph 4) applies if an Illinois place of business of the seller receives the offer or counteroffer to purchase, or accepts the offer or counteroffer to purchase so as to create a contract, or transmits a complete and unconditional offer to sell to the purchaser, or makes the final delivery of the property in

Illinois to the purchaser. In that event, the answer to the question of whether paragraph 2 or paragraph 3 applies depends on whether or not such Illinois place of business of the seller is a place of business at which the seller does some intrastate retail selling in Illinois.

5. *Miscellaneous.* a. The foregoing examples are illustrative, but not exhaustive. Fact situations which are not specifically referred to herein may be submitted to the Department for special consideration and a ruling.

b. For use in those instances in which it may become material to determine where title to the property passes to the purchaser, the following illustrations are given:

(1) If the contract of sale provides where title is to pass to the purchaser, such contractual provision controls.

(2) If the seller contracts to (and does) ship or otherwise deliver the property from a point outside Illinois directly to the purchaser in Illinois f.o.b. the out-of-State point of origin, or f.o.b. the out-of-State point of origin freight prepaid, or f.o.b. the out-of-State point of origin freight allowed, title presumptively passes at such out-of-State point of origin to the purchaser.

(3) If the seller ships or otherwise delivers the property from a point outside Illinois to the purchaser in Illinois f.o.b. the Illinois destination, title presumptively passes in Illinois to the purchaser.

(4) If the contract of sale is silent both as to the place at which title is to pass to the purchaser and as to the f.o.b. point of the shipment or other mode of delivery, but the seller is required to pay freight or other transportation charges to the Illinois destination at which delivery is to be made to the purchaser (e.g., where the sale and delivery are made for a lump sum delivered price and the destina-

tion is in Illinois), title presumptively passes in Illinois to the purchaser.

(5) If the title would otherwise pass outside Illinois to the purchaser, this conclusion is not changed by the fact that the seller, by contract with the purchaser, reserves the title solely for the purpose of securing payment of all or a portion of the selling price.

c. It is immaterial that the purchaser or his representative subsequently takes or sends the property out of Illinois for use outside Illinois or for use in the conduct of interstate commerce after receiving physical possession of the property in Illinois.

d. The term "promotional activities," as used in this regulation, shall mean and include any activities employed by salesmen or representatives in stimulating sales, including general correspondence; the distribution of catalogs or other similar sales literature; radio, newspaper, magazine and other similar general advertising; good will calls; the interviewing of prospective customers; the solicitation of sales; and the like, but shall not include the receiving of orders, the making of contracts nor the making of complete and unconditional offers to sell to specific customers who accept such offers without modification so as to create contracts (e.g., see paragraphs 2a and 3c hereinabove).

e. If a seller makes some sales by or through an Illinois place of business at which he does some intrastate retail selling, but also makes some sales in other ways, liability or exemption as to the receipts from any particular sale will depend on the facts of that sale. If the sale is made by or through the Illinois place of business at which the seller sometimes makes intrastate retail sales, paragraph 2 above applies. If the sale is made in some other way, paragraphs 3 or 4 above apply. *(As revised July, 1955.)*